UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	08-CR-415(FB)
-against-	:	United States Courthouse Brooklyn, New York
RALPH CIOFFI AND MATTHEW TANNIN,	:	Tuesday, November 3, 2009 10:00 a.m.
Defendants.	:	

TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES SENIOR DISTRICT JUDGE, and a Jury

A P P E A R A N C E S:

For the Government: BENTON J. CAMPBELL, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: JAMES MCGOVERN, ESQ.
PATRICK SINCLAIR, ESQ.
ILENE JAROLAW, ESQ.
BRIAN SANO, ESQ.
Assistant United States Attorneys

For the Defendant: WILLIAMS & CONNOLLY, LLP
Attorneys for the Defendant -
Ralph Cioffi
725 Twelfth Street, N.W.
Washington, D.C. 20005
BY: DANE BUTSWINKAS, ESQ.
MARGARET A. KEELEY, ESQ.
HACK WIEGMANN, ESQ.

Appearances: (Continued.)

BRUNE & RICHARD, LLP
Attorneys for the Plaintiffs -
Matthew Tannin
80 Broad Street
New York, New York 10004
BY: SUSAN E. BRUNE, ESQ.
NINA M. BEATTIE, ESQ.
MARYANN J. SUNG, ESQ.
LAURIE EDELSTEIN, ESQ.

Also Present: S.A. Dengler,
Federal Bureau of Investigation

Court Reporter: Anthony D. Frisolone, CSR, RDR, CRR, CRI
Official Court Reporter
Telephone: (718) 613-2487
Facsimile: (718) 613-2694
E-mail: Anthony_Frisolone@nyed.uscourts.gov

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(In open court.)

(Defendants present in open court.)

COURTROOM DEPUTY: All rise, the United States District Court for the Eastern District of New York is now in session, the Honorable Frederic Block is now presiding.

(Honorable Frederic Block takes the bench.)

COURTROOM DEPUTY: Calling criminal cause for jury trial in Docket No. 08-CR-415, *United States of America against Ralph Cioffi and Matthew Tannin*.

Counsel, please note your appearances for the record.

MR. MCGOVERN: For the United States of America, Assistant United States Attorneys James McGovern, Patrick Sinclair, Ilene Jaroslaw, and Brian Sano. Also at counsel table is Special Agent Dengler

Good morning, Your Honor.

MR. BUTSWINKAS Dane Butswinkas and Margaret Keeley for Mr. Cioffi.

Good morning, Your Honor.

MS. BRUNE: Susan Brune for Mr. Tannin.

Good morning, Your Honor.

THE COURT: Good morning, everybody.

THE CLERK: Criminal cause on trial, United States versus Ralph Cioffi and Matthew Tannin. All parties and counsel accounted for

THE COURT: Is the jury here? Anything we have to talk about before we bring the jury in this morning?

MS. BRUNE: I would like to hand up the report that Dr. Hubbard provided in discovery. I don't know if there will be any issue.

THE COURT: Is he going to be your next witness?

MS. BRUNE: Yes, your Honor

THE COURT: Let's bring the jury in and have Dr. Hubbard come in at the same time.

(Jury present.)

THE COURT: Good morning, everybody.

We have our next witness who I asked to come here so that we don't waste any time.

You will let me know if you really think you need off at 4:00 o'clock for election purposes. We will see how things go today.

Let's formally call the next witness.

MS. BRUNE: Defense called R. Glenn Hubbard to the stand.

R O B E R T G L E N N H U B B A R D,

having been first duly sworn, was examined and testified as follows:

THE CLERK: State your full name and spell it for

the record

THE WITNESS: Robert Glenn Hubbard, R O B E R T, G L E N N, H U B B A R D

THE COURT: Your witness.

MS. BRUNE: Thank you.

DIRECT EXAMINATION

BY MS. BRUNE:

Q What is your current employment?

A I'm currently the dean of the graduate school for business at Columbia University where I'm also a professor of finance in the business school and professor in economics in practical arts and sciences.

Q What's your responsibility as dean?

A As dean principally the management of the school and its faculty. Also the school's image in the business community and fund raising for the school as a private university.

Q What subjects do you teach as a professor?

A As professor I teach a variety of subjects.

This term I'm teaching a class in private equity. Next term I will do a class, the future of financial services in the MBA program.

Next term on the faculty of arts and sciences a Ph.D. class in tax policy.

Q Would you please tell the jury your educational background?

A Sure. I received my Bachelor of Arts and Bachelor of Science degrees in 1979, summa cum laude from the University of Central Florida.

I was received my Masters of Arts and Ph.D. degrees in economics from Harvard University.

Q What other positions have you held, other than your work at Columbia University?

A I began my teaching career at North Western University, which is in Everstone, Illinois. I have also taught at the Kennedy School of Government at that time at Harvard, Harvard Business School, and at the University of Chicago Graduate School of Business.

Outside of teaching I have been a research associate for many years at the National Bureau of Economic Research in Cambridge and I had two stints in government service from 1991 to 1993 with the deputy assistant secretary for tax policy in the Treasury Department and from 2001 to 2003 was chairman of the Counsel of Economic Advisors in the White House.

Q What is the chairman of economic advisors?

A The Counsel of Economic Advisors are three economists whose job is to advise the president on economic policy. The chairman is his principal advisor on the topics really whatever the president wants advise on. In my particular day it had to do with finance obviously, which was a big topic,

tax policy, debt, accounting and terrorist attacks and so on

Q Have you provided work for the U.S. Department of Energy?

A Yes. Early in my career I built a model for the Energy Department on the affects of oil prices on the economy and the affect on the oil market.

Q Do you know whether that model is still in use?

A In further iterations down the road, it's still in use by the DOE.

Q When you say a model, would you tell the jury what you mean?

A By a model, meaning all the model is really is an explanation of how something in the economy works, so take key economic variables and assumptions and predict affects in the case of the model you asked about, what would the affect of changes in the economy and demand conditions in the oil market on U.S. inflation or U.S. GEP and likewise what would be the feedback affects on oil prices of changes and activity in the American economy.

Q Have you provided other work for the U.S. government?

A Yes, I have.

Q Would you give an example of a few of those for the jury?

A Over the years I have done work for the International

Trade Commission, Internal Receive Service and for the Federal Reserve.

Q What is the Federal Reserve?

A The Federal Reserve is the nation's central bank. The capacity in which I worked with the Fed, both the Federal Reserve Bank, and the Board of Governors have been matters relating to monetary policy and to the regulations of the financial system.

Q What are your areas of professional interest and study?

A My areas of research as an economist are centered principally on financial economics, what economists call public economics, analysis of government, tax and spending policies, and the study of firms and industries.

Q You have an area of interest in corporate finance?

A Yes. A subset of my work in financial economics has been the study of corporate finance, subjects I have written on and taught on many occasions.

Q What is corporate finance.

A Corporate finance is an area of finance explaining how corporations finance themselves, so topics related to different debt policies, capital structure issues, links between the financial decision and the actual operation of the firm.

Q Have you perform any academic work or written any publications with respect to hedge funds?

A Yes.
Q Can you given the jury an example of you work in that area?
A I have written on the comparison of hedge funds to 40 Act vehicles of mutual fund vehicles, differences and regulatory implications.
In the past few years I co-chaired the National Commission on Capital Market Regulations, and a big area of inquiry for us was the operation of hedge funds and of disclosure in the market for derivatives.
Q You mentioned publications. Approximately, how many publications in the form of articles have you put out over the years?
A In terms of the my academic articles, peer review article, a little over a hundred.
Q Have you written any books?
A Several books. I have a freshmen textbook in economics, which I'm pleased to say is popular, and I have a textbook in money and financial markets. I have also written books on health care and on tax policy.
Q Have you previously testified in court as an expert?
A Yes, I have.
Q Have you ever not been accepted as an expert in court?
A No, I have not.
MS. BRUNE: I would like to tender Dr. Hubbard as expert

in the field of economics and finance.

THE COURT: Does the government wish to inquire?

MR. McGOVERN: We have no questions.

THE COURT: Continue.

BY MS. BRUNE:

Q Dr. Hubbard, did I ask you to perform some analysis relating the case now on trial?

A Yes, you did.

Q Would you describe the analysis in broad categories and then we will go into more detail?

A In the broadest category --

THE COURT: I will interrupt you. Were you retained to render any opinions in this case.

THE WITNESS: No, sir.

THE COURT: What was the nature of your retention, what were you supposed to do.

THE WITNESS: As I understand your question, I was retained and paid for my time to answer some specific questions not to provide a specific opinion.

THE COURT: To explain certain things.

THE WITNESS: Yes.

THE COURT: Certain economic terms or concepts like what? Like what for example?

THE WITNESS: What are the strategies of these funds, how does one assess the performance of the fund.

THE COURT: These funds, which funds are you talking about generically hedge funds.

THE WITNESS: The two funds at interest here, the High Grade Fund and the Enhanced Leveraged Fund.

THE COURT: To explain what their strategy was?

THE WITNESS: How they performed and what their prospects would be going forward.

THE COURT: You analyzed certain data given to you?

THE WITNESS: Yes.

THE COURT: Give the jurors a sense of that.

THE WITNESS: The data or the number of types, there is a large data base called PORSHA that has all the information on the transactions of the fund, every type of security that is bought and sold. Data set opinion for that has information on the collateral underlying the collateralized debt obligations that the funds have, and a series of net asset value files that the fund produced every month as well as internal reports about working capital and liquidity and stress tests that fund had done.

THE COURT: All of this materials were furnished to you for the purpose of being able to answer what specific question?

THE WITNESS: The specific questions that I was asked to answer, would it be reasonable from an economic perspective if these funds were structured and managed to

achieve ongoing profitable returns for investors.

THE COURT: That's an opinion you're going to give whether it would be reasonable based upon analyzing all of that data?

THE WITNESS: Yes.

THE COURT: You were retained to give opinions?

THE WITNESS: Yes, sir. By opinion you meant some specific --

THE COURT: What conclusions, what opinions do you have with respect to that particular question?

THE WITNESS: My conclusion, your Honor, is that the funds were structured and managed so that it would be reasonable from an economic perspective, profitable to operate them on an ongoing forward basis, as a month end January, February, March and April of 2007.

THE COURT: And then the second question you were asked to opine upon or to explain?

THE WITNESS: The second question would it be reasonable as of those dates to also seek additional capital, new investors to the funds.

THE COURT: And did you come to an opinion in that respect?

THE WITNESS: Yes, your Honor.

I did answer, yes, it would be reasonable.

THE COURT: And there was the last question that you

were asked to opine about.

THE WITNESS: Throws are the principal conclusions. My report, that I prepared, all offered conclusions about liquidity, plan management and process issues. Those are the high level conclusions.

THE COURT: Is there anything else that you wish to have this witness opine about?

MS. BRUNE: As we go along there will be subsidiary conclusions.

He has given the primary opinions.

THE COURT: I would like to get his opinions out and he could explain a little about the basis or the reasons why he came to those conclusions. Then I would like to give the government an opportunity to cross-examine, then you could come back with redirect.

MS. BRUNE: Very well, your Honor.

THE COURT: If you can explain to the jury a little about the reasons you came to those conclusions and then we'll give the government an opportunity to question you and we will go back and forth.

THE WITNESS: Certainly, your Honor.

If I take the first of the questions that the judge asked me about, which is the conclusion of whether it's economically reasonable to believe these funds were structured and managed to continue to make profits going

forward, one would need to do three things:

First of all, describe the strategy. The strategy here is a essentially a leveraged strategy with hedging. What does that mean? It's like a bank, in the case of a bank, the bank has to equity capital, it uses leverage, it earns higher returns. In the case of these funds that leverage came from repurchase agreements and the firms then bought -- the fund then bought mortgaged instruments, corporate bonds backed instrument and earned a return.

The second element of that strategy was hedging. So that you could if you take a position in markets or mortgages, other asset backed securities, hedge those and these funds did that.

So they pursued a strategy that was well articulated, actually quite conventional in structured finance products.

Then the second is if you're going to opine on whether it's reasonable to operate these funds going forward, you need a baseline, which means you need a model, so what I did was look at the holdings of the funds, and then model what sitting at any point in time one could reasonably expect to happen in the future, house prices and the path of future hedging contracts with the so-called ABX index contracts.

These were just things of the ways in which as to hedge funds movement in-house prices. With that in mind, I

was able to model and assimilate at points in time, the end of January, the end of February, the end of March, the end of April, given the information the fund would have had at that time, information not only in their own portfolio, but information known in the market place, would you believe sitting before the fact that this strategy could be profit annual. I did indeed find that.

If it's useful, your Honor, I could offer a demonstrative of that. That indeed was what I found.

The second conclusion is whether given that, it's reasonable to take in new investors. The fund did, of course, take in new money, during the period of the early part of 2007.

I found based on my modeling analysis it was reasonable to believe that that would be profitable. These two pieces of analysis were bolstered by two other things that I looked at:

One, was what would have happened to the hedges that the funds held. The fund, of course, at the end of the play close. But the question is what would have happened to the funds hedging strategy had it played out. I found that the funds would have returned very large amounts of money to investors, about seven hundred million dollars to the High Grade Fund, six hundred and fifty million dollars to the Enhanced Leveraged Fund.

The other element that is very important here is the behavior of the lenders. So when I make a statement that it's reasonable to operate the fund, believe the fund could operate profitably, that is a statement about the equity holders, the fund is charged with maximizing interest of the equity holders, the investors.

What about the debt holders? During this period, the end of April, that I was asked to analyze. Repurchase agreement lenders, the people who were providing the leverage, that you heard about in the trial, made very few changes in their contracts. They acted as if the arrangements in which they had been engaged with the two funds was a stable one.

So my own empirical work is bolstered by the view both by the gains and the hedges and also by the activities of the lenders, of course, who had real money on the table. I could offer demonstrative examples but at a high level --

THE COURT: Let me ask. You are not talking to one of the classes that form your business school now. I don't know whether I would qualify to be a student in that school. We're dealing with regular folks, including the judge, who are trying to get their hands on a lot of this language that is somewhat unique, I guess, to your world and that's why experts are helpful to explain to lay people, including the judge, what a lot of these terms mean.

I'm not going to ask you lots of questions in the first instance. I think it is sufficient for present purposes you did explain to the jury the basic basis for your conclusion. I don't know whether all of that is absorbed by them. I don't know if it's absorbed by me.

I think it is sufficient for present purposes that you gave the jurors a little sense of the basis for the conclusions you made.

What we're going to do now, unless Ms. Brune has one or two searching questions that she would like to ask now, we will let the government question and Ms. Brune can come back and ask more questions.

MS. BRUNE: It would work fine as long as the judge will allow the us latitude to ask a questions as to the work that underlie these high level conclusions.

THE COURT: We will do that.

The jury has a sense of Dr. Hubbard, for coming to those opinions. I will let the government have a chance to question and then you will come back. We will give you plenty of latitude to get it all out.

MS. BRUNE: Let me go through one subject.

BY MS. BRUNE:

Q Were you compensated for the time that you spent to do your analysis?

A Yes, I was.

Q How did you get compensated?
A I was paid for each hour that I spent on the proceeding of $1,200 an hour.
Q Approximately, how many hours have you spent so far on this matter?
A Approximately, eighty.
Q Were you assisted by others in performing the work?
A Yes, I was. The staff at the analysis group firm worked under my direction on pieces of the report.
MS. BRUNE: Thank you, your Honor.
THE COURT: Anybody wish to inquiry from the government?
MR. McGOVERN: I thought you said anyone other than the government.
CROSS EXAMINATION
BY MR. McGOVERN:
Q Good morning, Dr. Hubbard?
A Good morning.
Q My name is Jim McGovern. I'm an assistant United States attorney in the Eastern District of New York. You and I never chatted before, is that right?
A Not to my knowledge, no.
Q Dr. Hubbard, I might as well pickup where we left off as far as your compensation goes.
You are getting $1,200 an hour for your time here; is

that right?
A Yes.
Q We're talking about eighty hours just for your time. In the neighborhood of $100,000?
A Roughly, sure.
Q And this analysis group, how many people at the analysis group?
A I'm sorry, I don't know. It's a firm with many offices.
Q You work with them regularly, do you not?
A Yes, but I have no idea how many employees they have. I'm not an employee.
Q Do you work with a regular group of people from the analysis group?
A Depends on the matter.
Q Well, in this matter, for instance, how many folks did you work with?
A I would say the people that I meet with number principally three.
Q You put together about an eighty page report on this case, right?
A Yes. I don't know the exact number of pages, lengthy to be sure.
Q Believe me I haven't counted them either.
And it was a very detailed report with footnotes and cross references and a bibliography and all of that, right?

A Yes, all of those are in the report.
Q Who actually wrote the report?
A I'm the principal author of the report.
Q What does that mean?
A I drafted the report. I received help as I answered Ms. Brune's questions on construction of exhibits, location of documents, and things like that.
Q You sat down one day at your computer and wrote out this entire report, is that right?
A I wouldn't describe it as sitting down and writing it all in a day, something like that process.
Q I'm trying to understand, Dr. Hubbard, you are the dean of Columbia Business School, I would think that you would have other things going on as you described during your direct.

How much of your actual like hand was put into this report, did you review it as the final and now your opinions author or did you write the report?
A I think, I answered your question. I'm the principal draftsman of the report.
Q Fair enough.

You are actually getting a little more than $1,200 an hour, is that right?
A I guess, $1,200 an hour for my time.
Q Do you get anything from the analysis group or a piece

of their bill?
A The analysis group offers experts something called an attribution, which is based on their gross billings in the matter.
Q Do you accept that offer?
A Yes, I do.
Q Is that offer something in the line of ten percent of their billings to you?
A No, in this particular case it's seven and a half percent.
Q In other cases it's as high as ten percent?
A It would depend on the case.
Q For instance, you testified in the case of in Re: American Funds just recently in the Central District of California?
A I did indeed.
Q In that case you received ten percent of the bill from this analysis group?
A I don't recall. It sounds right to me.
Q But it was the same sort of arrangement where -- for them you were billing eleven hundred dollars an hour, right?
A Yes.
Q But there was another component of your bill was this analysis group offer as you call it, correct?
A That is correct, the attribution.

Q And do you have an idea how much the attribution added up to in this case?
A I really don't. I haven't received them.
Q Are you expecting a number $50,000 sounds right?
A We have no idea, it's based on time that I supplied.
Q You reviewed your report, correct?
A Yes.
Q And you reviewed all of the work that went into this report.

We're not talking about just reading a couple of articles, we're talking about dissecting PORSHA data and opinion for data, which are tables and data on top of data on top of data.

Aren't we talking about potentially several hundreds hours of work here?
A I would be speculating to guess. Yes, lots of work.
Q Do you know what the analysis group bills are?
A I really don't. Each person would bill at whatever his or her appropriate rate was.
Q Why don't you take a crack at it. Based on your experience have you seen the billings in the past, have you reviewed those bills in the past?
A I have not. There would be no reason for me to do so.
Q Okay.

As you sit here you have no idea, besides the $100,000

you are getting for your testimony and previous work on this case, whatever you might get from the analysis group, it could be 50,000, another 100,000, maybe $200,000?

A I have idea.

Q Okay.

Your time that you spent here, the eighty hours of bill time for this case involves not just preparing the report, correct?

A That is correct.

Q In fact, you are getting a fee for just coming into court today, is that right?

A Yes, with the number of hours that I spend.

Q Your meetings with counsel in the case?

A The most recent meetings and the court appearance wouldn't be in the eighty some small number of hours.

Q Hopefully we will keep that within a reasonable range.

Did you have to travel for this case at all?

A No.

Q Have you met with Mr. Cioffi's lawyers in this case?

A I have, yes.

Q Have you participated in any of the mock trials that Mr. Cioffi had in advance of this trial?

A No, I have not.

Q Have you been asked to provide a recitation of what your testimony would be at this trial in advance of this trial?

A No.
Q Dr. Hubbard, during the course of your sort of qualifications questions, you say that you actually opine to a lot of matters outside of just hedge funds, is that right?
A I don't recall saying that. I certainly did research on a number of topics besides hedge funds.
Q And you have done some government work; is that right?
A Yes, I was in the government twice.
Q You worked in the first Bush administration in '91 to '93?
A Yes, sir.
Q Did that in any way involve hedge funds or running a hedge funds or anything like that?
A I only did so in two respects, the tax treatment at the time of derivatives in hedge funds was a live issue around the tax part of the treasury.
I have also participated in the Treasuries working group to financial reform you remember call at that time treasury produced a large white paper on the reform of the financial system.
Q Again you were back in the government as a chairman of economic advisors for the next President Bush, is that right?
A Yes.
Q In that administration did you focus on hedge funds at all or was that under part of your responsibility?

A Yes, in the sense of work on financial stability, financial regulations, also statistics on the working group to financial markets.

Probably recall this was a period of significant financial turmoil during 2001.

Q You actually have written on the economic affects of federal participation in terrorism risks, right?

A Yes, I have.

Q What was that about?

A Well, you call after the 9/11 the insurance markets were disrupted, and the federal government came in with what was called terrorist risk insurance, taking the back end, so that large commercial real estate properties and others could get insurance.

I participated in helping the president design his own approach to that and that was the subject of the article to which you referred.

Q Not necessarily germane to the hedge funds business, correct?

A I wouldn't say it's directly related to hedge funds, no.

Q Dr. Hubbard, so you understand where I'm coming from. It's fair to say you have a wide -- very vast level of experience here in topics outside of how to run a hedge funds, correct?

A I would like to think so, yes.

Q You authored books on several topics other than what it is we're talking about in this case, correct?
A That is correct.
Q And while you appear to know a fair amount about hedge funds, you wouldn't say that is the only thing you concentrated your work on?
A I wouldn't say it's the only, but it's something that I worked on.
Q And you had done research in the 1940 Act -- done some work on the 1940 Act?
A Comparison of hedge funds and the 40 Act vehicles, yes.
Q That is the Investment Advisors Act, right?
A Yes.
Q Now, you went through your findings and I wanted to take a look at them if I could.
You have a report there in front of you?
A I don't, sir, sorry.
THE COURT: You can have mine.
THE WITNESS: The judge was kind enough to hand me his.
MR. McGOVERN: Thank you, Judge Block.
Q On page three of your report, Dr. Hubbard, you list for us your findings?
A Yes, sir.
Q And you said during your direct examination that you

weren't called and paid to offer an opinion in this case, correct?

A Again, by that I meant I wasn't given a statement and told to adopt it.

I was asked to investigate some topics and offer opinions, which are on page three.

Q Your opinions are, of course, limited by the information provided to you, correct?

A Well, the information provided to me plus my own analysis, yes, comprise my basis of course.

Q For instance, hypothetically, if I were to give you a bunch of pieces of information and not give you all of the information that could affect the accuracy of your opinion, correct?

A It could, but I have no reason to believe that is the case here.

Q Of course not.

But what I'm saying that is a potentiality of just the recipient of information from one side of a piece of litigation, isn't it?

A I don't consider myself the recipient of the information, I have asked for certain information and collected a lot of information on my own.

Q And provided to you?

A Yes.

Q And you don't know if there was other information that wasn't provided to you?
A I'm sure there are things in the world that I don't have in my records.
I don't think any of them would change my conclusion.
Q Did you review all of the e-mails sent between these parties during this period of time?
A I reviewed remember a number of correspondence.
Q Did you see e-mails where they were discussing closing the fund in early March of 2007?
A Yes.
Q Did you see e-mail that discussed the possibilities -- withdrawn.
Did you see e-mail that discussed the closing of the funds in April of 2007?
A I did see that, yes.
Q And did you see the e-mail where Mr. Tannin said he thought the market was toast?
A I did see that e-mail, yes.
Q But any way, getting back to what your conclusions are, these are conclusions that are in answer to specific questions, is that correct, Dr. Hubbard?
A Yes.
Q The first of your conclusions is that the strategies of the funds were clear and communicated to investors and the

funds were managed in a way consistent with those strategies?
A Yes, sir.
Q That was a question that was -- you were answering with that opinion, correct?
A Correct.
Q And was that a question that was posed by Ms. Brune or Mr. Butswinkas?
A Yes, I was asked -- counsel asked me to opine on that.
Q Opine whether or not the strategy of the fund was communicated?
A Yes.
Q And for that you would have reviewed the PPM?
A Correct.
Q And then your next opinion is that in the first part of 2007, that there was expectations the funds would generate a positive return?
A Yes.
Q Isn't it fair to say there is expectation that they could generate a positive return?
A What I mean by that, an economist is using the information that is available at the end of each of the first four months, it would be reasonable to assume that there is a positive return.
That is the likely outcome.
Q That is something that you refer to throughout your

writings here during the course of this report, using Latin you are ex ante, your ex ante sort of views of things?

A Yes, you don't need the Latin.

Only information that you have at the time that you make a decision was really relevant to ascertaining whether you made a decision.

Q Your analysis is forward looking, right, it's like at the time what do you think looking forward, what would be a reasonable view of this?

A Correct.

That is the decision the managers had to make.

Q There was a reasonable expectations, according to you, that the funds would generate positive returns, correct?

A The month end of each of those months.

Q You would agree that they didn't?

A I would agree with that, yes.

Q And that your next opinion is that the change in market conditions impacted the value of the funds, did not provide a basis to shutdown the funds in your view, correct?

A That is correct.

Q And your next one is that the working capital was below guideline levels, is that right?

A That's not what it says, sir.

Q Working capital cushion below a guideline level does not assure the suggest the funds would be forced to liquidate

their assets?
A Yes.
Q And you answered that question as it was posed by defense counsel as well?
A Yes, sir.
Q And the decision to continue to operate the funds and raise capital as the end of each of these funds was consistent with the reasonable expectations that the fund would generate positive returns, correct?
A And incur further losses if liquidated during this time.
Q And incur further losses?
A Yes.
Q I don't want the questions as long as your sentence.
That was another question that you were asked by the defense, right?
A Yes, sir.
Q Basically, if we were to put these together, your view or your entire opinion is that their reasonable expectation that this Enhanced Fund and High Grade Fund could have survived through the spring of 2007?
A That is indeed the opinion, yes.
Q I took five paragraphs, six paragraphs and broke it down, right. That is a fair statement?
A My opinion is a fair statement. How you broke things down I will let you describe, yes, is that a reasonable

characterization.
Q That this might have worked?
A I'm saying it much stronger than that.
Again, each of those month ends it would be reasonable to assume it would work.
Q There was a reasonable expectation that this might have worked at the end of each month?
A There were positive returns in January or February.
Q I'm actually keeping in mind the question that I asked you, there was a reasonable expectation this might have worked during the spring of 2007, that is your opinion?
A It was the right decision to continue operating. That's the decision.
Q And, of course, it didn't work as we ultimately find out, right?
A I do not know what you mean, didn't work. The fund closed for a variety of reasons.
If you would like to talk about--.
Q Yes, we will.
At the end of the day we know that it didn't work, correct?
A I'm not sure I know what you mean. At the end of the day the funds closed.
Q At the end -- let me --
THE COURT: I think you are mincing words.

There was a reason why all of these predictions or these reasonable expectations did not materialize. We all know that.

THE WITNESS: I would happy to say what I think about it.

THE COURT: We're all curious to find out what was the fly in the ointment. Something did not enter into the analysis, something aberrational happened. We all know that the economy wasn't in the best of shape. It happened at about that time.

Why don't you tell the lay jury as professor of economics what happened.

THE WITNESS: I would break it up into two periods. If you look at the first few months of 2007, what the funds were doing, they were doing two things:

They had a leveraged carry strategy, to investor money, borrowing money and buying assets, mortgages bonds, whatever. They are earning a return on those assets. They can lose money if the risk on those assets, the spreads that you heard about in the proceedings go up.

To counter that they were also doing some hedging, they were buying contracts on individual mortgages securities and on classes of mortgage securities.

The hedges over time worked very well, because the market in these derivative contracts, the ABX contracts were

very good hedges.

In March and April the hedging strategy that they did didn't perform like one would have expected. Going forward what closed the funds if you will --

THE COURT: There was a reason why they did not perform as expected. Maybe you can explain that to the jurors.

THE WITNESS: What we know historically is that the ABX index of moved in the same direction of houses prices. If you expect house prices to fall you expect a decline in the ABX contracts, you can stay for that.

Remember the ABX contracts run different tranches, all the way down to the less safe and you would expect the movement in the less safe to be even more magnified when you have that change in house prices.

That what I find, it's well known to market participants, and during March and April that correlation went the other way.

In affect, with the lens of hindsight we know for a lot of market factors, people covering very large short sales, not something known at the time, but what actually caused the funds to close was the collapse of the leveraged arrangements, the repurchase agreement folks saying no we will not continue lending.

Q Which was always a risk, right?

A Always a risk.

Remember what the managers are trying to do is maximize the interest of the equity holders, the investors. Perfectly reasonable for them to want to continue.

If you are a repo lender you don't get the upside if the fund does well, you simply get paid back.

Lenders are far more risk adverse. At the end of June, the purchase agreement lenders said, no, we don't want to play anymore. What that means the funds has to then sell assets.

I'm sure you have heard what the markets was like at the time, the prices were distressed as you sell those assets you have enough to pay back the repo lenders, but nothing for the equity holders.

THE COURT: Wasn't there a way of anticipating this? We're looking at hindsight. We have these brilliant people, they're making these analysis. Wasn't there a reasonable way to expect things don't go up all the time. It's a difficult concept to embrace and put into the equation.

THE WITNESS: Thinks look better with the lens of hindsight.

Using the data that you had at the time you could reasonably believe that the strategy would be profitable even if house prices fall.

In my report I predicted that house prices would

fall. I predicted that they would fall faster than they actually did. It's the hedges that were making the money.

It was not because they were bullish on the housing market when they shouldn't have been. They, like my work, was bearish on housing.

What they made the mistake the co-movement between house prices and the derivative prices would remain the same. They were not alone --

THE COURT: Stop for a moment.

When you say derivative contracts, explain again to the jury what a derivative contract is?

THE WITNESS: The many steps here, It's a Wonderful Life, the housing market in the 1930s, mortgages held by a bank, it's not what we're taking about here.

The mortgages are put into pools and called residential mortgage backed securities end in tranches, get put into other arrangements called collateralized debt obligation.

When funds like these two Bear Sterns funds made investments in these vehicles, they attempted to hedge and one way to hedge might be to buy what are called credit default swaps, the probability that some individual securities is going to default.

Another would be to buy contracts on index of mortgages of a particular vintage and particular risk. The

ABX contracts.

The funds did both. They bought credit default swaps on single names, bought these ABX indexes, they believed and my model also believed that house prices would fall. That wasn't the issue.

The issue was whether these contracts would move the way they traditionally had with house prices. That was what happened in March and April.

At the end of the day, what happens the repo lenders decide they don't want to play anymore and in a leverage transaction one had a leverage of ten times the other 27 and a half times. If the lender doesn't want to lend to you anymore, your done.

THE COURT: Just to give the jury, as a result of everything that happened are there lessons to learn from this happening in the future when prices for houses go up and the sophisticated financing takes place again?

THE WITNESS: Personally, I think there are a lot of lessons to be learned. As co-chair of the National Commission the report, if you wanted I'll give you the web site, I could give you commercial answer for it, but the simple answer to your question, yes, and some of the reforms that many have commented on and myself, have called upon increasing capital requirements and always making sure that credit rating agencies do an even better job than they have

done in the past.

Getting more information out there. This is from the lens of hindsight.

THE COURT: I'm not here to conduct a course. You teach all of this at the Columbia business school. If the jurors want to sign up as students they can be educated.

THE WITNESS: I'm doing it next term.

THE COURT: I know I am going far afield. We're trying to get an understanding of what happened in the real world.

To what extent it's relevant to the issues in this case, I will not comment. Itself not my role to do that and I will let the lawyers deal with all of that.

For present purposes, I think, the jury probably appreciates getting a little more depth and understanding of what happened in the economic and stressful times.

Continue with your questions.

MR. McGOVERN: Thank you, your Honor.

BY MR. McGOVERN:

Q In line with your most resent comments they're about relevance.

Dr. Hubbard, we've spoken or I have tried to distill your opinion and by all means if I am over distilling it, let me know.

Your thesis here appears to be that there was reasonable

expectations that these funds might have actually made it through the spring of 2007?

A Conditional on the information available for each of those month end periods, yes.

Q As you slip in the colloquial with the repo lenders not wanting to play anymore, excuse me if I get similarly pedestrian with comments, it might have worked, okay.

Doctor, one of the things that you actually were provided in this case was the indictment--?

A Yes, sir.

Q -- is that correct?

And you saw in the indictment there is actually no mention of a charge that says that these defendants are on trial for having a bad strategy, correct?

A That's my understanding, yes.

Q There is no charge against them that they didn't -- that there wasn't a reasonable expectations that this whole plan to run this fund through the spring of 2007 might have worked, right?

A That's my understanding, yes, and I am a non-attorney.

Q What you read from the indictment they are on trial because they misled their investors.

Do you understand that?

MS. BRUNE: I think that is not --

THE COURT: Sustained as far as that is concerned.

Ask him a specific question rather than characterize what the indictment is.

Q Your testimony here doesn't address in any way whether these defendants disclosed to their investors the amount of redemptions in their funds, correct?

A Sir, you just asked me a question about misleading investors --

Q That was stricken.

We very to stick with this one?

A Your question now?

Q Your understanding is this case doesn't in any way touch upon whether or not the defendant's appropriately disclosed to the investors that the amount of redemptions that were pending in their fund?

A I wouldn't agree with that, no.

Q You also have opinions whether they disclosed to their investors the amount of redemptions that were pending in the funds during that particular time, the May 2007 time frame?

A It's not the question precisely that you asked me. Would I have an opinion on the economics of what would have mattered, what the investors would have known.

Q You are offering an opinion whether they actually met the standard for disclosing that information, correct?

A I'm not an attorney, it's not for me to opine on the stand.

Q Now, I want to talk to you a little more about what you and Judge Block were talking about. Why the funds failed. That would be covered pages 39 and 40 of your report.

In your report you point to two reasons why the funds failed; is that right?

A I mention two factors, one of which is the ultimate reason they failed. Yes, there are two factors.

Q There are two factors. The first of which, the investors redemption requests, correct?

A Yes, and I go onto explain why that couldn't be the causal factor.

Q Okay.

When you wrote the report, as opposed to what you are saying today, you made A, B--

A you noted as being investor redemption requests, correct?

A Yes, but I also note in the report why that couldn't be a causal factor.

Q Maybe it was because chronologically the investors' redemption requests became a big problem before the repo parties became a big problem, is that why?

A I don't know what you mean by "problem". Did some of the redemption requests occur before the repo lines were pulled, that is factually correct.

Q Would you agree the first -- not the first -- a big

problem occurred on June 7, 2007 when the funds has to announce to all their investors nobody could get their money back.

Do you remember that date or did you review anything about that?

A Yes, as you know from the report, it's on the page that you are looking at, but, yes, that is a suspension which is why this cannot be causally connected.

You can deal with redemptions by means of suspension. It's the debt holders that could force the end of the exit.

Q I think, I understand.

Are you saying that this suspension of redemption by the fund where they told all of the investors nobody is getting their money, did that have an affect on the repo parties decision, say that we don't want to play anymore

A That is not what a suspension means. Maybe it's worth clarifying if you like.

That is an incorrect statement of what a suspension is, generally, in this case and specifically.

Q I didn't go to the Columbia business school?

A You don't need to. It's plain English.

Q Suspension of redemption --

THE COURT: He could not get into the business school, he had to go to law school.

THE WITNESS: Your comment, your Honor.

Q When you suspend redemption, it means that for the time being nobody can get their money out, correct?

None of the investors can gets their money out?

A It's an old problem in finance. It's the way commercial banks had been organized, yes.

Q And when there is a suspension, it doesn't look good to investors as far as the future goes, correct?

A It's not necessarily the case.

What a suspension means, it's the judgement of management to meet the redemption requests, given market prices would lead to either a significant markdown or collapse of the fund.

You could suspend and have the equity holder be okay post a period of suspension. What you can't live through is the debt holders say, no, we will not lend anymore.

Q Suspension is a good thing?

A I don't think you could infer that from what I said. You mischaracterized what a suspension is.

Q I'm trying to figure out what you are saying. A suspension is it a good thing or a bad thing?

A All a suspension means, in the judgement of the manager there are too many redemption requests for whatever reason, that could be met at current market prices.

If you had all liquid assets, it wouldn't be a problem, just go and sell them. If you don't have liquid assets it

could indeed be a problem.
Q Would you agree that on Wall Street the people who work on Wall Street actually view a suspension as a bad thing, how the appearance of your fund looks to others in the market place?
A You clearly would not want to be suspending or debating your investors, no.
Q You never worked on Wall Street, have you?
A No, I'm a director of a company, but I'm not employed.
Q You never had the job that of Mr. Cioffi or Mr. Tannin had, correct?
A I have not.
Q And you never actually conducted trades or fought with opposition on prices, correct?
A I have not.
Q And you understand in Wall Street, unfortunately it's very opportunistic?
A I'm not sure what you mean by that.
Q If you suspend redemption and tell the market place that you're in trouble by announcing that you are suspending redemption, when you try to sell your assets off, you might not get the best prices. Do you agree with that?
A Let's unpack all the reasons that I don't agree--.
Q I don't know if you have to unpack--?
THE COURT: He says that he doesn't agree.

MR. McGOVERN: The answers is yes or no. I don't know if he's having a problem answering the question--.

THE COURT: Just ask the questions and there will be redirect and we will get it all out. Go ahead.

Q If you don't agree that the suspension -- the suspension of redemption in this case was part of the problem that ultimately caused these funds to fail?

THE COURT: You can answer that yes or no.

A If I could answer it in a sentence.

THE COURT: Part of the problem--.

THE WITNESS: It's a symptom of a third thing that caused both of these.

Q Just so we can cut to the chase, what happens here at the end of the day, is that repo counterpart parties, the people infused like 19 billion dollars into these funds said, you're not a good risk any more, I want my money back, right?

A The Repo lenders did not continue lending, did not feel it would meet the risk tolerance.

Q Let's unpack that a little bit--?

THE COURT: He's trying to find out if there is a correlation between that decision and the redemptions in this matter.

THE WITNESS: Only insofar as they are both correlated with the underlying problem.

THE COURT: We're trying to simplify it as best we

can. It may be different. There may be nuances. But if you could help the jury understand this I would appreciate it.

I think the question to begin with, whether there was a correlation or connection between the redemption on the one hand, such as they were, and the decision by the repo lenders.

THE WITNESS: There is certainly.

THE COURT: Give us a sense of that. Speak for a few minutes and let's move on.

THE WITNESS: They are certainly correlated and come from the same underlying factor, the views of what was going on in the housing market, the market in housing finance on top of it, had shifted.

Q Shifted dramatically?

A Well, had shifted.

If you look at the prices during the time, the ABX contracts were rallying. They were going the other way. If you look at the data that I looked at on house prices it would have been reasonable to presume that the houses would fall through 2007, even what you knew in 2007.

Q You would agree that others had a different opinion during that period of time, correct?

A I'm not sure what you mean "different opinion" about what. People always have different opinions from everything. That is an easy question to answer.

Q Did we get to the point we agree the reason that the funds failed was because the repo lenders took back their securities?

A I stated and you restated it.

THE COURT: Let's move on.

Q What we're talking about is repurchasing agreements, correct?

A Correct.

Q A repurchasing agreement is a way in which hedge funds managers like Mr. Cioffi and Mr. Tannin would borrow more money or infuse leveraged into their funds, is that right

A It's a secured lending transaction.

Q It's like pouring money-- putting up some collateral-- under a repurchase agreement the bank lending you the money on the securities, correct?

A Correct.

Q When those banks-- those several banks took back their securities in June or July of 2007, when they did that, they took back assets that they owned already?

A What they are saying, I will not continue the secured lending arrangement. That is what a repurchase agreement is

Q They took their assets, correct?

A We're no longer willing to do this.

Q That's when the entire building of these fund of twenty million dollars plus just collapsed, right?
A To understand why that is, when you withdraw the repurchase lending you have to sell assets at distressed prices and equity holders are last in line.
Q These assets are what we end up calling toxic assets, there is no market for these assets?
A I'm not suture that I would accept that.
THE COURT: We're getting far afield. Ask another question.
Q In your report you say that there are two reasons for the funds collapsing, and one of them is the investor redemption requests and the other one as the repo lenders taking back their assets, correct?
A Yes.
Q Let me just ask you some general questions about hedge funds.
You know a lot about hedge funds and how they work, correct?
A Yes, sir.
Q Would you agree that you need investors to have a hedge fund?
A You need some equity in the hedge fund, yes.
Q If you don't have investors taking money from third parties, you are not really a hedge fund, correct?

A If I understand your question, you have to have somebody putting up equity.
Q All of your investors redeem from the hedge funds, you don't have a hedge funds anymore, correct?
A You would not have merchandise if all your investors redeemed.
Q You would agree there is at least the possibility that others in the -- others in the investment world back in the spring of 2007, would have disagreed with your thesis that you offered here today?
A I'm sure people might disagree with any economic thesis. I have no reason to believe one way or the other.
Q In that time period were you offering a different economic thesis. Didn't you give speeches at business schools where you said you thought the economy was doing well during the spring of 2007?
A The economy was not a problem during the spring of 2007. The problem during 2007 was the housing market, which ultimately did impact upon large financial institutions in 2008.
Q You gave a speech at the University of Milwaukee back in the spring of 2007 where you said some very favorable things, how you felt about how these markets were doing, is that right or wrong?
A I don't remember the markets. It's quit possible that I

had good opinions on the economy at that time.
Q And opinions are like -- you would agree your opinion could have changed from time to time, correct?
A My opinions changes when I get new information, sir.
Q Because you're a reasonable guy, right?
A I'm saying economists use information. I think I'm a reasonable guy, yes.
Q Investors in a hedge funds have a right to make their own decision whether or not they want to redeem or stay in the hedge fund?
A Absolutely.
Q As you noted here one of the problems or I don't want to overstate it, one of the bumps in the road perhaps for you was that all of the investors wanted to get out in June of 2007 or a large percent wanted to get out. That was the case here these investors ultimately decided to execute their right to redeem from the fund, correct?
A Yes, in June, after the period of my analysis, yes.
Q The biggest investors in the Enhanced Fund put in requests of 160 million dollars at the end of April?
A Yes.
Q You understand that?
A Yes.
Q Each investors in the hedge funds in your review -- have you read the transcripts of everybody that testified at this

trial?
A No, sir, not everybody.
Q You read most of the transcripts?
THE COURT: You don't have to bend forward to try to be heard. Your voice will pickup fine. It maybe a distraction.
Q You read most of the transcripts?
A No, sir.
Q Which ones have you read?
A I focused on Mr. Van Solkema. It seemed most relevant to what I was doing.
Q How would you know which one was most relevant to what you were doing?
A Because --
Q That's the one that they gave you?
A I asked for testimony that related to models that were being used and that's what I received.
Q And you received that and you read it?
A Yes.
Q You didn't read Howard Brown's testimony or Klaus Chavanne's testimony or the guy from Fix, the biggest investor in the fund, up didn't read his testimony?
A No.
Q And you would understand that each investor in a hedge funds might actually have sort of a unique characteristics

about their investing position.

Do you understand that?

A Sure, each investor may have liquidity needs that are particular to him or her.

Q They might have an individual philosophy that might frankly be unreasonable?

A They are free to have it.

Q They are free to have mandate on their investment, mandate that we're going to make absolute returns?

A They did have whatever mandate or philosophy they wished.

Q Each investors in a fund, even in their own mind, might have a different strategy from the next investor?

A Entirely possible.

Q All you are saying, looking back on this, you think reasonably, this might have worked, they might have -- the defendants might have be able to pull this off, correct?

A I'm saying more than that. Given the information that each of those month ends, January through April, the economically reasonable outcome would have had a reasonable outcome for the funds given what they knew at that time.

Q We agree it went a different way?

A For part of that time frame, yes.

Q Your reasonable expectation. There are other people that had reasonable expectations that were the opposite,

true, you would agree with that?
A I don't know what you mean by the opposite. People have different forecasts.
Q These funds ended up with no money, and there were other investors in the same market place that ended up with billions, you understand that?
A They were pursuing different strategies, yes.
Q Absolutely different strategies in the same markets, correct?
A That's what makes markets work, sir.
Q Exactly, different opinions.
So anyway, now these investors they can be a fickled group of people, investors in hedge funds are going to ask a lot of questions?
A I don't know if I would describe them as "fickled". They may well ask questions, of course.
Q One guy as a crazy strategy and another one has a different strategy, their questions may not always make sense, correct?
A It's not for me to decide whether investor questions make sense. People can ask whatever questions they want.
Q You would similarly agree that investors have varied limits of sophistication?
A Yes, the general public.
Q To be an investor in a hedge funds all you need is

$300,000 or a million dollars of net worth, is that your understanding?

A That is what it is to be an accredited investors. Some High Grades had minimal investment requirements that would be higher than that.

Q There is no requirement that you graduate from the esteem Columbia Business School, correct?

A No, sir, the accredited investor requirements are written with respect to income test and net worth tests.

Q If you win LOTO lot you could put money into a hedge fund, if you won Powerball, for instance, you could probably get into a hedge funds, correct?

A That's what an accredited investor is, it's up to the individual hedge funds and investors.

Q It has nothing to do with ones level of education or actual level of sophistication in the markets, is that right?

A I'm not an attorney, accredited investors standards are designed to be a proxy for sophistication, they are based on income and networth.

Q What does an attorney have to do with it, it's the rules.

You are the dean of the Columbia Business School, you don't know what the rules are to get into a hedge fund?

A You asked and I answered. You can't infer -- there is no way for me to get into the legal history of the standards.

Q I wasn't -- I apologize for interrupting. I wasn't asking for the legal history. I was asking for the black and white, the rules -- the rules say to be a hedge fund investor it's purely based on how much cash you have, right?

A To be an accredited investor, that is a term of art.

Q And some of these investors may not have really understood these strategies that were laid out in the PPM, correct?

THE COURT: You are speculating.

A All I am saying the strategies were clearly articulated.

THE COURT: Move onto something else.

Q Some investors may have not read them.

MR. BUTSWINKAS: Your Honor --

THE COURT: Move on.

Q Some investors in hedge funds can tolerate losses more than other investors, yes?

THE COURT: I think, it's all argumentative.

MR. McGOVERN: Your Honor, he's an expert --

THE COURT: It has nothing to do with his expertise. It's common sense that some people can handle more or less losses. Some are wealthier than others.

I don't think they are terribly probative. Move to something else.

Q Based on the documents that you reviewed, did you learn the biggest investor in the Enhanced Fund was actually an

investor that was using leverage?
A I really don't recall that, sorry.
Q Do you understand what that means, that an investor in the fund was using leverage?
A You are asking me do I understand what leverage is, of course.
Q Do you know what that means as it relates to that investor's tolerance for losses?
A I couldn't possibly speculate. That would depend on the investor's net worth, other investments, the investors --
THE COURT: There are a lots of intangibles.
Someone was borrowing money to put into the hedge funds I think that was the question.
A So what?
Q If you are investing with borrowed money your tolerance for losses maybe a little bit lower than the average investor's?
A I have no basis for answering that.
Q And some of the investors -- to be fair, did you look into who the investors were in this case?
A I didn't look at the individual investors, no.
Q You reviewed documents relating to the investors, correct?
A I saw some documents related to the investors.
Q If I may, looking at your reports, you reviewed

documents that were supplied by investors, during the course of this case, right?

A Yes, sir.

Q And Tremont would have been -- are up familiar with that?

A Yes.

Q It was a fund of funds?

A Yes.

Q You understand there were other funds of funds type investors in these two hedge funds, the Enhanced and the High Grade Fund?

A Yes.

Q Funds to funds are institutional that in many instances would have their own risks departments, is that right?

A They certainly may.

Q They would be investors who would be capable of making gone their own investment decisions about whether to stay or go from a hedge funds?

A I cannot recall whether they are capable or not.

Q Now, your opinions here are based on your review of the data and whatever other information that you were given by the defense attorneys about what the state of affairs were back during the spring of 2007, is that right?

A Partially and also my analysis of what the state of affairs would likely be going forward, yes, drawn from the

same data and information to assess crisis.
Q What you are saying, it's not just looking at the data that is what is guiding your opinions in this case, correct?
A In parts, it's looking at the data and in part its using that same data to model strategies and returns. It's all a data driven exercise.
Q It's looking at the data and you offering what you viewed about the state of the markets back during that period of the spring of 2007. Doesn't that play --
THE COURT: I think, with all due respect we are getting repetitious. We've gone over this a lot of times already.
If you can focus on something that you have not touched on, go ahead.
MR. McGOVERN: Sure, your Honor.
THE COURT: We'll have redirect. I'm going to allow for that, and you'll have ample opportunity to further these types of things. I think we're getting repetitious. Move on to something else.
Q You accepted this data driven exercise. You are assuming that all the data that you were given were accurate. I want to make sure?
A The data that I used, yes. The transaction data--.
THE COURT: It was material furnished to you.
Go ahead.

Q Do you understand that there are potentially accuracy problems with the PORSHA data that you were provided?
A There may be well be with any data.
Q Those were actually like alive database or live data basis in the spring of 2007. Do you understand that?
A Yes, but those data wouldn't have figured prominently in the analysis that you are asking me about, simply for classifying securities by rating.
THE COURT: Mr. McGovern, we can move beyond that. He relied upon the data, explained the data.
If you have something specific to point out about that, if their is any mistaken information, go ahead. Let's move on.
Q Just finishing the thought of the investors in this case. You don't know if any of the opinions that you offered here in this case were the same that were held by the people who are investing in the funds during the spring of 2007, correct?
A I have no way of knowing. It would not be relating to the analysis that I did.
Q If those people who invested in these funds in the spring of 2007, were looking for information about the funds, where would they look?
A If I understanding your question, they would be looking at information on the underlying asset markets that these

funds are investing in. I would form my opinion -- potential investors-- based on the strategy, based on what I believe was happening and the markets and the prospect for returns.

Q Do you know if the investors actually were provided with all of that information?

A The data that you used were publicly available. Anybody could have used them.

Q The portfolio was publicly available?

A The portfolio, prices, these are publicly available.

Q You are not talking about whether this portfolio in particular was available to the general public, correct?

A That's not true, sir. You know if you read the report that is not true. I did use the individual --

THE COURT: Why don't you explain. You have the hedge funds. Is that information available to the general public?

THE WITNESS: What I did was to use the actual end of month information on the ABX and ABX holdings that is known to the fund.

What I used was the publicly available information to get a sense whether the managers could have believed that. That is the question.

(Followed on next page.)

THE COURT: The basic -- let me ask you this.

Is the basic portfolio information, can any investor find out what's in the portfolio at any given name?

THE WITNESS: No. Investors in hedge funds would not know specific assets in a portfolio. They would know the strategy.

THE COURT: They would know the strategy.

THE WITNESS: Right.

THE COURT: But the knowledge of what's contained in the portfolio, would that just be unique to the managers of the portfolio and not available to the general public?

THE WITNESS: There may be commentary but, generally speaking, hedge funds are not vehicles in which investors don't have that kind of granular information.

THE COURT: That's what I want to understand. If an investor wanted to find out what was in the portfolio, what would that investor do?

THE WITNESS: An investor could ask questions about anything. It might be particular tranches or --

THE COURT: So, the information would come by the investors asking questions of the managers of the funds and that's how they would learn what to do in the portfolio. I just want to get a clear understanding of it.

THE WITNESS: Yes, sir. That would be one way. Another way might be the managers themselves disclosing

information. In some of the conference calls, the manager talked about in particular --

THE COURT: The source of information would come from the managers. I mean, I don't want to put words into your mouth, I just want to understand whether that's how hedge funds work.

THE WITNESS: Yes, sir. This is very different from, say, a mutual fund or something like that.

THE COURT: Explain the difference to the jurors.

THE WITNESS: Again, here, the investors in a hedge fund are investing in a strategy. The hedge fund manager would typically tell an investor very little about the individual assets that the investor holds. It's just a very different strategy than, say, a typical strategy where I might know the portfolio of assets that you buy.

EXAMINATION

BY MR. MCGOVERN:

(Continuing.)

Q This has also been referred to as "black box." Right?

A It would seem like a black box. You don't know the individual things that you're having to buy. You buy a strategy. That's what it means by buying into a hedge fund. It not disclosed what it is.

Q In general, hedge funds managers are very proprietary or very careful about disclosing what assets they're actually

holding. Isn't that right?
A Well, that's part of their trading strategy and value added. If you have a superior strategy relative to me, you don't want to give enough information for me to pick it up. So, yes, it's a competing way for hedge fund managers to distinguish themselves and this, of course, is widely understood by hedge fund investors.
THE COURT: Basically, hedge funds are competing with each other. One would not want the other one to know what the portfolio was because that would sort of give a clue to the other hedge funds about what they were doing and might change the strategy decisions. I want to get a common-sense understanding.
THE WITNESS: Yes, sir. I might have a particular view vintage of mortgages and a tranche of RMBS or CDOs. I may not want the market to generally share that view, I may view it as my insight which is my proprietary --
THE COURT: I think you've helped to explain this.
Go ahead. Next question.
EXAMINATION
BY MR. MCGOVERN:
(Continuing.)
Q So I understand. The source of any follow-up information about what was in the portfolio or what was going on in the portfolio would have to be a conversation with the

managers either on conference calls or pick up the phone and call the manager; right?

A If I understand your question, that's not true. One important thing of what's going on in the portfolio would be returns and, of course, those are disclosed monthly to investors.

Q Yes.

A Why the --

MR. BUTSWINKAS: Can he finish the answer.

THE COURT: If I were an investor, could I call up somebody and say, "I want to know what's in the portfolio." You're the manager, let's say I'm just curious as to what you're investing in, is that something that the investors are entitled to know?

THE WITNESS: I can't give you a legal opinion. The practical answer economic answer would be no. What might happen is a disclosure of types of bets that you're taking or directing your attention in a strategy, and the particular conference calls that are in this record are replete with those examples. But whether I'm holding this particular QSIP would not be subject, typically, of a conversation.

THE COURT: Next question.

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EXAMINATION
BY MR. MCGOVERN:
(Continuing.)
Q So, would you agree that the vast majority of the information that you relied on for your opinion, that being an organization of data and all the things about the portfolio other than what it is you knew about the economy and the market at that time.

All that information, that data that was provided to you, would have been nonpublic information during the spring of 2007. Would you agree with that?
A No, sir. Again, viability assumptions depends on these market prior forecasts.

THE COURT: So, let me phrase it this way. Some information is nonpublic and some information would be public.

Is that what I glean from your answers?

THE WITNESS: That's correct. But all available to the manager which is what's economically --

THE COURT: All available?

THE WITNESS: Yes.

THE COURT: Can you give us some sense of what falls into the public realm of things and what would fall into the nonpublic or maybe that's an oversimplification.

THE WITNESS: Certainly, Your Honor.

An example of something that would be nonpublic would be the particular elements of the portfolio as opposed to the broad brush. The public information would be the data on information on ABX contracts that are disclosed daily by Markit which is a service -- M-a-r-k-i-t -- of, for example, the housing price forecast. The economic question is whether the managers would reasonably see this as viable.

So, it's fair to look at all the information a manager could see, but yes, it would look at whether there would be both public and nonpublic information.

THE COURT: I'm not so sure I understand what would be public and what would be nonpublic, how you draw the line. I mean, you have a way of explaining it, but maybe it's a good thing I went to law school instead of business school. Try it again.

THE WITNESS: There is a simple bright line. Anything I'm doing about the market: Housing price forecasts, derivative contracts on housing, mortgages, taxes all that stuff is public data.

I'm going to use a model but I'm using public data. The individual elements and transactions a so-called Portia of data would be known to the manager but not generally known to the members of the investing public.

THE COURT: I think you explained it. Any other

questions now?

MR. MCGOVERN: Sure.

EXAMINATION

BY MR. MCGOVERN:

(Continuing.)

Q You keep on saying that the whole issue in this case is whether or not the managers would have believed there to have been a viable strategy during the spring of 2007.

Am I understanding that?

A That's the central economic issue, yes.

Q Did you have any idea whether or not that issue has anything to do with the criminal charges in this case?

MR. BUTSWINKAS: Your Honor, this is.

MS. BRUNE: Objection.

THE COURT: Sustained.

Q If I may just for general here.

You offered some testimony there on your direct examination about the hedges should have probably worked after?

MR. BUTSWINKAS: Objection.

Q After the --

THE COURT: Let me hear the question.

Q What would have happened with the hedges after THE fund imploded.

Would that accurately characterize your

testimony?

MR. BUTSWINKAS: Mischaracterizes the testimony.

A I did the calculation and I know the prices so I know that, yes, they would have worked.

THE COURT: The witness is qualified.

Go ahead. Anything else?

So, your testimony is that if the funds hadn't blown up, that the fund actually could have made money on the hedges.

THE WITNESS: That is indeed my testimony. I know hedges I know the prices it's just arithmetic, sir.

EXAMINATION

BY MR. MCGOVERN:

(Continuing.)

Q Yes. And so, what does that really have to do with anything?

THE COURT: Well, all right. Let's not go there.

Do you have any other probative questions?

MR. MCGOVERN: I don't have anything else.

THE COURT: Let's take our morning break and then we'll do redirect. I don't mean to cut you short Mr. Butswinkas.

Who will be doing the redirect? Ms. Brune?

MS. BRUNE: I will continue to inquire given what I understand about what Your Honor said about latitude.

MR. BUTSWINKAS: At this point I'm going to watch.
THE COURT: Members of the jury, come back 25 to 12:00.
COURTROOM DEPUTY: All rise.
(Jury exits courtroom at 12:21 p.m.)
(Witness leaves the witness stand.)
(Recess taken.)
(Witness takes the witness stand.)
THE COURT: All right. Let's bring the jurors back in.
You folks should sit down.
COURTROOM DEPUTY: All rise.
(Jury enters courtroom at 12:51 p.m.)
COURTROOM DEPUTY: You all may be seated.
THE COURT: Ms. Brune, go ahead.
MS. BRUNE: Thank you.

REDIRECT EXAMINATION

BY MS. BRUNE:

Q You previously testified that you used the books and records of the funds to determine what the fund's actual portfolios actually were?

A Yes, ma'am.

Q Can you give us a breakdown of the ABS securities that are held in each of the two funds?

A The ABS securities were rated with triple A, double A,

and single A and so on.

My recollection is that the combination of double A and triple A is on the order of 90 percent pore both funds with a balance being in single A or lower or nonrated securities.

Q You determined, in arriving at your conclusions, that the funds used other kinds of financing other than repo loans?

A Yes.

Q What other kinds of financing did you find in your work?

A The funds also had credit facilities that were backed by commercial paper throughout their life; that is, some assets contributed to a vehicle, commercial paper, issued against that vehicle typically guaranteed by a commercial bank.

In the Enhanced Leverage Fund that would be the Barclay's vehicle. Toward the end of this time period, in spring of 2007, another vehicle for Bank of America. There was an earlier vehicle called KLIO from Citi.

Q Did you view the facility that was coming, the Bank of America facility, as significant in reaching your conclusions?

A Yes.

Q And how so?

A Well, the facility would allow extra liquidity for two things: Both for the placement of existing assets and also

the ability to acquire new assets as credit spreads widened.
Q During the period of your analysis, did the funds have sufficient operational liquidity?
A The judgment that I reached was that the liquidity tests performed by the funds seemed reasonable. So in that sense, yes.
Q Was there at any point before the end of the story that the funds did not have sufficient operational liquidity?
A If by that you mean from the fund's own internal guidelines. There were a couple of periods in which I would describe yellow lights flashing; that is, a need to rebuild liquidity in the High-Grade Fund.

And that liquidity rebuilding could happen from delevering; that is, selling assets or from raising additional funds. But for most of the period at issue in the first part of 2007, the funds had met their internal liquidity guidelines.
Q And would you explain a little more about the internal liquidity guidelines?
A Certainly. What the funds had done periodically, roughly on the order of weekly, were a series of stress tests. And just like recently, big commercial banks have undergone stress tests.

In the current period, it's the same idea. You would look at the worst experience that you could have in

a particular asset class and the stress test that they did was assume the worst experience simultaneously in all asset classes and then assume that the hair cut, the additional collateral posting for the repo facilities, increased by 50 percent. Assume both of those.

The series of stress tests. The liquidity tests on that was a target was the fund would have enough liquidity, a hundred percent, to meet a short fall associated with that stress test. That's the test the funds performed.

Q Was there anything about the liquidity cushion that's reflected there that suggested that the High-Grade Fund should shut down?

A No. Not at all. Indeed, even in periods in which there were yellow lights, a need to rebuild, I saw nothing in the transactions that indicate any kind of forced selling or distressed selling to do that. I know that new money was both available and obtained by both of the funds during the first four months of 2007.

Q And how about the Enhanced Leverage Fund. Were there ever any yellow lights flashing as you described it?

A I don't recall any during that period.

Q Based on your analysis, did you see a response to the liquidity cushion issue in the High-Grade Fund?

A Yes. The response being typically to sell assets.

Q Were those forced sells?

A No. The way I would determine a forced sale would be at prices that were at great different from recently prevailing market prices because I have information on the individual transactions. I did look at this and I saw no departure from recent market prices, so I wouldn't describe them as forced I would see them as meeting a prudent internal guideline.

Q You testified already that at points in 2007, the credit hedges were not working as expected. Did that mean that the funds should shut down?

A No. What it meant was that the funds had to then make a decision about whether they believed that the movement in the credit hedges, to be specific, housing prices are going down. Instead of credit hedges going down, they were going up.

In March, and much of April, should they believe that the word had changed to use traditional statistical methods they, and what I did in the report, did the latter.

So, there's no inference that one could draw that you should shut down the furnished.

Q Was it reasonable to expect that the hedges would again begin working as expected?

A Well, it was not only reasonable to expect that, they will have. I did the arithmetic exercise, and assuming the hedges had been held, and the funds had continued, they would have been very profitable. The aberration that appeared in

the ABX market in March and April subsequently reversed, that is, continued its downward trend.

Q I believe that you testified that in your model, you assumed and predicted that housing prices would go down?

A Yes. For the duration of 2007, I assumed housing prices would go down based on the data I had available to me.

Q Can you explain to the jury, then, how it could be that housing prices would go down yet, nonetheless, you would project a -- reasonably project, rather, a positive return for the funds?

A Certainly. Remember there are two ways, principals ways, I should say. The funds were earning returns, one was off the ABS portfolio which had to be Markit. The other was off these hedges.

If you were net short particular hedges you could make money even when housing prices fell. So, in particular what the funds did was go net short some Portia vintages such as the damages '06-1 and the triple B tranche of those vintages which essentially said, "We believe that the conditions in the mortgage market will deteriorate," that was the bet and that's how you could expect to make more money because the price of the ABX contracts moved some which gave much more greater bang for the buck if you will, for hedges against the lower rated securities than the higher-rated securities.

Q Would you explain for the jury what Relative Value Trading is?

A Sure. Relative Value Trading would be looking for mismatched pricing opportunities at the level of CDOs or portions of CDOs and a relative value trade plight be to acquire one and short another.

The Relative Value Trading was part of the fund's strategy. In the calculations that I did that assumed forward-looking profitability, I didn't even include relative value trades because there is no reason for me to get in the heads of managers to know what they would have done or wouldn't haven't done before there was an opportunity.

Q Were relative value trades available to make profits in an up market and a down market?

A Sure. What relative value means is you're just doing these pair-wise comparisons of mispriced assets. There's no reason to expect that those trades are more available in up markets and down markets. They're more available in times of very high volatility which, of course, characterized this period.

Q You already mentioned that the High-Grade Funds sold some assets during March and April.

Did the fact that the High-Grade Funds sold some assets change your opinion about whether the fund could reasonably be expected to make money for investors?

A No. Again, that has to do with internal liquidity guidelines. And I would note that during that period, the repo lenders who were making the really high-frequency decision by and large, changed their hair cuts not at all. Any margin call they made was met.

So, there was simply nothing in the environment that would point in that direction.

Q Have you reviewed e-mails in the March 2007 timeframe in which Mr. Cioffi indicates to salespeople that he's not buying?

A I have seen at least one such e-mail.

Q Does that in any way change your opinion?

A No. It could well be that a lack of interest in buying what that particular sell-side person wants to sell or simply a negotiation. I have no way of inferring or doing exegesis on the e-mail.

MR. MCGOVERN: I object and move to strike that exegesis. He's being asked to speculate about what Mr. Cioffi was clearly saying otherwise.

MS. BRUNE: The prosecutor started this.

THE COURT: The jury heard it, let's not dwell on it.

I will give you a little bit of latitude, don't take advantage of my largess.

MS. BRUNE: I will try not to, Your Honor. Thank

you.
EXAMINATION
BY MS. BRUNE:
(Continuing.)
Q During the March and April time period, were the funds buying assets?
A Yes.
Q And finally.
You were asked by the prosecutor about some e-mails relating to closing the High-Grade Fund in March of 2007.
Did you see those e-mails?
A Yes, I did.
Q Did they change your opinion?
A No. What the e-mails clearly stated was that it would be perhaps in the best interest to move investors from the High-Grade Fund to the Enhanced Liquidity Fund because of the superior Barclay's lending facility that was available that requires no exegesis. That was clearly spelled out in the text of the e-mail.
Q What would be the advantage of putting the two funds together in the Enhanced Leverage Fund?
A Barclay's facility would have provided abundant liquidity for both refinancing and acquiring new assets. So, it would have been possibly in the interest of shareholders

to do that. That's a decision the managers would have to make.

MS. BRUNE: No further questions.

THE COURT: Anything further, Mr. McGovern?

RECROSS-EXAMINATION

BY MR. McGOVERN:

Q The Bank of America facility that you discussed with Ms. Brune, that didn't close until May 22nd of 2007, isn't that right?

A That's my understanding. I think the signing was on March 9th with closing in May, yes.

Q That involved a lot of money; correct?

A I think it was a little over $4 billion, something like that.

Q And by that point it was really too late for that $4 billion of CDO money to help matters at the fund, isn't that right?

A I don't know that I could necessarily say that, no.

Q And you had testified that, as far as you could tell, that liquidity wasn't a problem or you didn't see any yellow lights during the Spring of 2007; right?

A That was my testimony based on the fund's internal management; yes.

Q You know that the reason that they suspended redemptions in both the High-Grade Fund and the Enhanced Fund was because

of a lack of liquidity to permit them to meet the redemptions. Do you know that?

A That is out of the period in which the question I was asked which was January through April.

Q By the way, your analysis of this fund occurred years after the fund's collapse; is that right?

A Well, it occurred recently and I would say a couple of years ago, sure.

Q Okay.

Would you have deferred to the portfolio managers who were dealing with the -- with their counterparties in the marketplace as to what was actually going on during that period of time?

A I'm not sure what you're asking me.

What I was asked to do was use the information anyone could have had in real-time. I can't, of course, be in the head of managers.

Q I think you said that.

And you don't know what Mr. Cioffi and Mr. Tannin were actually thinking during this period of time the spring of 2007, right?

A There's no way I could know that.

Q There's no way you could know that.

And that information, again, you're talking about was not available to anyone, was it?

A Well, I can't accept that, sir, because the conference calls clearly talked about specific bets, and because I have access to the data, I am available to ascertain that those bets were, in fact, taken.
Q You have access to the data. The investors never had access to the Portia database or the information in the portfolio?
A That's correct. They are not relevant for my analysis but certainly that's true.
Q I can't answer questions about what's relevant for your analysis, sir.

Did you do that addition on the hedges after the fund's collapsed, right?

You said that it is the simple addition. You added it up and the funds would have made money on hedges?
A Yes.
Q Is that the only way that these funds made money on hedges?
A No.
Q In fact, they made money on their long positions as well; correct?
A Traditionally, they made money on both the ABS positions and occasionally on the hedge positions and on relative value trades and capital structure arbitrage. There are a number of ways they made money.

Q One of the reasons you hedge, you hedge against your long positions not working out; is that right?
A That would be the hedging motive. You might also wish to speculate, that is, take a net position because you have a view.
Q Did you ever analyze how the firm's long positions were doing at the time that the you figured out that the hedges would have been doing so well in I guess July or August of 2007?
A Well, we know the long positions decline in value as the credit spreads widen. The question is whether the net declines goes up.
Q Were the long positions, like, zero as of August of 2007?
A Funds had closed, so the equity value was zero at that time.
Q So, you don't think that that's relevant.

The question of how much money the fund would have made during that period of time that all of their long positions had disappeared?

A You're confusing ex-ante and ex-post. You're quoting actual facts. The question is: What's known at the time you knew the position. It would great if we all had 20/20 hindsight.
Q I agree with you. I'm sure -- we'll talk about ex-ante

and ex-post some other time.

You looked at these e-mails and these e-mails that were shown to you, none of them changed your view that a reasonable portfolio manager in this period of time would have believed that their fund might actually blow up, correct?

A There's a lot in that question. I think the answer to that is yes. I didn't see anything that would have changed my mind.

Q Were you shown all of the e-mails in this case?

A I'm sure I didn't see every e-mail in this case.

Q Were you ever shown Exhibit 100?

A You'll forgive me if I don't remember all the exhibit numbers and bait stamped, numbers.

MS. BRUNE: Your Honor, sidebar, please.

THE COURT: What's the next question?

Sustained as to that question.

Q Dr. Hubbard, the only e-mails that you saw in this case were the ones that were provided to you by Ms. Brune; is that right?

A I had asked at the beginning for a whole set of e-mails to be gathered. I don't know whether they came from Ms. Brune particularly.

Q And you have no way of knowing whether or not you got the full set; right?

THE COURT: We went through this before. Anything else?

MR. MCGOVERN: That's it.

THE COURT: Any other questions?

MS. BRUNE: No, Your Honor.

THE COURT: Thank you very much. You may step down.

THE WITNESS: Thank you, sir.

MR. BUTSWINKAS: Your Honor, may we approach briefly.

THE COURT: Before the next witness.

MR. BUTSWINKAS: Yes.

THE COURT: All right.

(Proceedings continued on next page.)

(Sidebar conference held on the record in the presence of the Court and counsel, out of the hearing of the jury.)

THE COURT: Okay. Yes, Mr. Butswinkas.

MR. BUTSWINKAS: I would like to have a few minutes to consult with Ms. Brune about what we're going to do at this point in time.

THE COURT: All right.

Do you want me to send the jurors out to lunch at this particular time.

MR. BUTSWINKAS: I think that will be very convenient.

THE COURT: Have them come back at 2:00. Is there a possibility that there may not be any other witnesses this afternoon?

MR. BUTSWINKAS: It's a possibility.

THE COURT: All right. We'll send them out to lunch now and come back at 2:00. And then we'll have lots of things to discuss in terms of your charges and everything else like that. And if that be the case, then you'll be resting, I guess; right?

MS. BRUNE: There are some documents we would like to offer and there are some evidentiary issues that need to be ironed out.

MR. BUTSWINKAS: Aside from those ministerial issues.

THE COURT: The Government is aware if there is any rebuttal case that you want to reflect upon.

MR. MCGOVERN: We'll reflect.

THE COURT: Because I told the jurors that there was a possibility we could have summations tomorrow, and if we let them go home early this will give us all the time we need to fine tune the charge and use the time to constructively do that.

MR. BUTSWINKAS: I don't know if the Court will consider this. Is it possible to do the closings on Thursday and Friday? It's a large record, a lot of documents, I would like to streamline what I say.

THE COURT: Well, you know, let's talk about that when we send the jurors out to lunch, all right.

MR. BUTSWINKAS: Okay.

MS. BRUNE: Thank you, Your Honor.

(Sidebar concludes.)

(Continued on next page.)

(In open court.)

THE COURT: I mentioned before that this is one of these staccato moments. Where going to let you go out to lunch and you will have an extended lunch period because we have lots to talk about.

When you return, at that time, we'll let you know what's going on with the case.

(Jury exits courtroom at 1:11 p.m.)

THE COURT: Everyone be seated.

Continuing the dialogue that we had at sidebar. You want to let me know at 2 o'clock whether you're going to have anybody else to call or do you want a few minutes now and then let me know.

MR. BUTSWINKAS: Whatever the Court's preference.

THE COURT: No, what's your preference? I mean these are tense moments.

MS. BRUNE: You're right about that. I think I would like some time to consult.

THE COURT: At 2 o'clock. And then you tell me whether there are going to be any additional witnesses that the defense wishes to call. The Government, in the interim, would reflect upon whether you might want any rebuttal testimony or evidence, okay?

Ms. Brune, you have some documents that you will like to offer as evidence?

Have you spoken to the Government about those documents so we don't have to get involved with any back and forth on that. Are they aware of them? Do that over lunchtime so that we can be on board.

MS. BRUNE: Unless things have changed, and the position with the Government has changed, they object to each and every one of the documents that we want to be included.

THE COURT: If you want, you can look at documents in anticipation of having to make rulings. Give them to Mr. Cone, my trusted law clerk, so that he can talk to me about that and we can chat about that at lunchtime.

How many documents are there?

MS. KEELEY: We have three on behalf of Mr. Cioffi.

THE COURT: Ms. Brune has a couple hundred.

MS. BRUNE: There's about a dozen.

Excuse me, my colleague told me there's about four or five. But, in any event, they all one way or the other fall into, I believe, completing what documents have already been --

THE COURT: Give me an example. Maybe we can do this quickly.

I will speak with Ms. Keeley first.

MS. KEELEY: I can give you an example first.

THE COURT: Which documents do you wish to have in evidence here? You have a couple hundred already.

MS. KEELEY: The first is Defendant's Exhibit 1828 which I can hand up to the Court.

THE COURT: Just a second 1828.

MS. KEELEY: Along with Government Exhibit 2 which has already been admitted.

THE COURT: 1828. You have an objection to that will Mr. Sinclair.

MR. MCGOVERN: Yes, Your Honor.

THE COURT: And you have two others that you want to talk about now.

MS. KEELEY: Yes, Your Honor.

A marketing agreement which has been already stipulated as far as authenticity.

THE COURT: Do you have an opinion about that?

MR. SINCLAIR: Relevance.

THE COURT: What's your objection to the proposed 1828?

MR. SINCLAIR: It's a hearsay, Your Honor.

THE COURT: Hearsay, okay. I'm just getting your objections.

What else?

MR. SINCLAIR:

MS. KEELEY: The last one also under Rule of Completeness is Defendant's Exhibit 1960 which is to complete --

THE COURT: Any problem, Mr. Sinclair? It's from canon.

MR. SINCLAIR: Right.

THE COURT: It's a one-liner. Any fuss over this?

MR. SINCLAIR: We can let it in.

THE COURT: 1960 can go into evidence. Then we'll tell that to the jurors when they return.

MS. KEELEY: Yes, Your Honor.

THE COURT: We'll make a formal entry.

MR. SINCLAIR: May I please understand what the issue is with respect to Government Exhibit 2. That I was unaware of, Ms. Keeley.

THE COURT: Why don't you talk to each other over the luncheon recess.

MS. BEATTIE: We can explain that here.

THE COURT: Anything else?

MS. BEATTIE: We have a couple, Your Honor.

So, Defendant's Exhibit 1960 is actually the continuation of a chain --

THE COURT: 1960 is going to be in evidence.

MS. BEATTIE: I'm sorry.

So then we have 1848 and 1849 which are a pair of e-mails that go to the defendant's state of mind and I'll hand them up.

THE COURT: Just one second.

Mr. Sinclair, you have those?

MR. SINCLAIR: I do, Your Honor. These are hearsay being offered by the defendant who is not testifying here. So, we think this is precluded under Rule 801.

THE COURT: We've been a little flexible here under the so-called concept of completeness, right?

MR. SINCLAIR: I think that makes sense on the Government's case when the defendant is offering this in their case it's entirely different, Your Honor.

THE COURT: 1848 and 1849 are the same.

MS. BEATTIE: They're slightly different, Your Honor, but I agree that they go together and 1848 goes to the defendant's state of mind.

THE COURT: Well, the defendant can testify as to his state of mind.

MR. SINCLAIR: And Mr. Quental.

THE COURT: Just doing that you are reinforcing the fact.

MR. SINCLAIR: And Mr. Quental could have been questioned on this document.

MS. BEATTIE: The Government put in through Dengler that they could have put in through witnesses.

THE COURT: I only rule on objections when they come to my attention. You're making the specific application; I'm going to make a specific ruling.

It is hearsay that there is no question that the issues goes to the state of mind of the defendants. If they want to testify, they can so testify. But I think you can't get it in through the back door so I'm not going to allow 1848 and 1849 in evidence. I find that this doesn't meet the standard for completion and it is hearsay. I made my ruling.

MS. BEATTIE: One more, Your Honor. Actually two more, Your Honor.

2661.

MR. SINCLAIR: Same issue, Your Honor.

MS. BEATTIE: And 2659.

THE COURT: Same type of thing. I can make the rulings now.

MR. SINCLAIR: They're all the same.

THE COURT: Seems to me they're the same.

MS. BEATTIE: The second one, and I'll get the Government's exhibit, but it comes under the Rule of Completion because --

THE COURT: You want 2661 under the so-called Rule of Completion?

MR. SINCLAIR: 2661 is a standalone e-mail, Your Honor, how can it be the Rule of Completion?

MS. BEATTIE: I'm sorry 2659.

THE COURT: I don't see where 2661 has any place to

play here. It is a document that should be in evidence, so I'm not going to allow it in.

MS. BEATTIE: Your Honor, it is an e-mail right in after the important "G Mail" and it goes to the defendant's state of mind.

THE COURT: The question is not whether it goes to the state of mind, the question is whether there is an evidentiary basis to allow it into evidence and we apply the Rule of Completion to some of the chatter.

MS. BEATTIE: That could also come in under the Rule of Completion given that prior e-mail.

THE COURT: I will let 2661 in. Let me look at 2659 now.

I don't see where this, you know, is admissible in evidence.

MS. BEATTIE: I will give Your Honor a prior e-mail that's related to this one, I just don't have a GX number on it. This is for the Rule of Completion, Your Honor.

THE COURT: I don't know what you are referring to. If you want me to to look at it.

MS. BEATTIE: After lunchtime, I will give you an additional --

MR. SINCLAIR: This is an e-mail with folks from Bank of America. I will wait to see the GX number, but I don't recall any exhibits that deal with this issue.

THE COURT: Talk about it over lunchtime and we'll try to do as much as we can now and we'll take care of it after lunchtime.

Anything else.

MS. BEATTIE: I don't believe so.

MS. KEELEY: No, Your Honor. Thank you.

THE COURT: Any other documents that you want to bring in.

Ms. Brune, do you have other things?

MS. BRUNE: Ms. Beattie speaks for both of us.

THE COURT: This covers the waterfront?

MS. KEELEY: Yes, Your Honor.

THE COURT: If you want me to look at what you think is the predicate for 2659 we'll look at after lunch.

What is the other unfinished item?

MS. KEELEY: The first two I handed you asked for the Government to take a second look at after lunch, the marketing book and the e-mail which I don't have the exhibit number in front of me since I handed it up.

THE COURT: The marketing book I haven't looked at it. It's a big document I have no way of assessing this right now.

What is this?

MS. KEELEY: The Government has already stipulated that it is a --

THE COURT: It's a Bear Stearns document, and rather than have to flesh out the relevance here I see no harm in having this document in evidence.

MR. SINCLAIR: We're just trying to follow the Court's lead with the concern about the number of documents coming into evidence, Your Honor.

THE COURT: I do appreciate that, but since we have so many this is the last one. We'll take 617 and allow it into evidence.

MS. KEELEY: One other Your Honor the second document you handed up to you which is an e-mail which is under the Rule of Completeness for GX-2.

THE COURT: Which one is this?

MS. KEELEY: This is the one I handed up with GX-2.

MS. BEATTIE: Isn't that 1828?

THE COURT: I think I ruled on all the others.

MS. KEELEY: With the exception of the e-mail that I handed up to Your Honor which was attached to GX-2 because it's actually a Rule of Completeness with respect to GX-2.

THE COURT: I'm trying to find where that is.

MS. KEELEY: I apologize but if I can approach, Your Honor.

COURTROOM DEPUTY: I'll get it.

THE COURT: I have 1828 we rule object that already.

That's the one you're talking with 1828, right?

MS. KEELEY: It could be, Your Honor. I, unfortunately, gave my only copy up to the Court.

MR. SINCLAIR: This is 1828.

MS. KEELEY: Yes, Your Honor, 1828.

And GX-2 is a document where Mr. Tannin introduced by the Government -- where Mr. Tannin is communicating with Mr. Cioffi concerning his bonus. Defendant's Exhibit 1828 actually talks about --

THE COURT: There are two, Mr. Sinclair. That's counsel's position. I have no, you know, thoughts about why it should be excluded necessarily. It doesn't seem to be to be the same state of mind types of concerns.

MR. SINCLAIR: This is an e-mail between non-defendants someone named Mailine Paleika who I don't even know who that is. Certainly, her name has not been mentioned at this trial previously.

THE COURT: That's true. These are just third-party people.

MS. KEELEY: They are, Your Honor. They are Bear Stearns employees, though. The Government has called a Bear Stearns, I shouldn't say "a Bear Stearns," they called a J.P. Morgan employee who testified about compensation who was not able to testify as to BSAM issues. We are simply trying

to avoid calling a Bear Stearns custodian.

THE COURT: About that I will allow that.

MR. SINCLAIR: Was it the issue of completeness?

What the Bear Stearns employee testified to was the actual salaries and what Government Exhibit 2 --

THE COURT: I have been trying to avoid calling this person. If you feel it's not possible to avoid having to call one, that's what I think they're trying to do here to short-cut this. It will be in evidence.

MR. SINCLAIR: We would like to see what the relevance is.

THE COURT: You have to call this person, it's not going to be in evidence. One thing left to deal with after lunch time?

MS. BEATTIE: Yes, Your Honor.

THE COURT: Tell me what that is again.

MS. BEATTIE: I guess just on this document it does go directly to GX-2 which was put into evidence.

THE COURT: I made my ruling. What's the last one? Maybe I can make my ruling on that as well.

MS. KEELEY: I will find you the document.

THE COURT: Do you want to wait until 2 o'clock to take that up with me? That's the last thing that we're going to be dealing with when we return at 2 o'clock.

MS. BEATTIE: That's fine.

THE COURT: In the meantime, be prepared to identify the documents that we are allowing in evidence when the jury comes back and I will call upon counsel to do that, okay?

Now, moving forward, there's a very real possibility that we will not need the jurors after 2 o'clock and that will depend upon what defense counsel's choices are. But if that be the choice then we will send them home today and my next question is we will use the rest of the afternoon to fine tune the charge. We have interesting things to discuss and we will be able to have a good opportunity to do that without unnecessary pressure.

So that would mean that we would be in the position to have summations tomorrow. Mr. Butswinkas has made a request that we put that over to Thursday since there's a lot of preparation to do.

What's the Government's position? Would you be prepared to sum up?

MR. MCGOVERN: I should ask the person who is going to do the summation.

MS. JAROSLAW: If it's court's wish for all parties to go forward.

THE COURT: Who is going to do the summations for the Government?

MS. JAROSLAW: I will, Your Honor.

THE COURT: You are prepared to do that?

MS. JAROSLAW: I will if counsel is willing to fool me on the same day.

THE COURT: Look, just take it one step at a time, all right?

How long do you think your summation will be? It may be academic.

MS. JAROSLAW: I haven't timed it yet, but I would estimate in the ballpark of three hours.

THE COURT: About three hours.

MS. JAROSLAW: That could change once we time it and I will inform the Court.

THE COURT: What I'm thinking about is the whole week, you see?

So, if we're going to not have the jury return until Thursday, then the summations will last all Thursday, realistically, Friday as well and then we would be faced with giving the charge on Monday. That's doable, I guess.

The game plan would be to have the summations completed by the end of Friday.

MR. MCGOVERN: I think that's doable.

MR. BUTSWINKAS: I agree.

THE COURT: Is that realistic?

MR. BUTSWINKAS: Yes, Your Honor.

MS. JAROSLAW: I think so.

THE COURT: I'm not averse to doing that and so the jurors would be told that they do have to work on Friday and I think that would be fine.

So, we'll have everything except my charge which would be the first thing on Monday morning. I think that will work well and that would give us ample opportunity to have the charge done as fast as everyone is capable of doing it you will also have to put together a nice list of all your exhibits I have them but they're all over the place here but do you want the Government to have its exhibit list available to hand to the jurors as well as each of the defendants.

COURTROOM DEPUTY: I told them all about that already.

THE COURT: If you want to see my list, I will give it to you. I want you to do it in an orderly fashion than I have and I assume that will not be a problem but pay particular attention to that because, in this type of case, it is easy for something to inadvertently to slip up.

I expect all of you to cooperate and that will take the pressure off since we will not be sitting on Wednesday so we will go in that direction.

MR. BUTSWINKAS: Thank you.

MR. MCGOVERN: Thank you. 2 o'clock.

(Luncheon recess taken; 1:27 p.m..)

(Continued on the next page.)

AFTERNOON SESSION

(In open court; 2:00 p.m.)

THE COURT: Please be seated.

COURTROOM DEPUTY: You all may be seated.

THE COURT: Okay. Everybody is here, I think, right? The jury is not here so let's move on. I got a letter from the Government that you wish to have the opportunity to show the necessary wire fraud nexus.

MR. MCGOVERN: Yes, Your Honor.

I think we haven't gotten an answer from the defense yet whether they're willing to stipulate to it, but after receiving the Rule 29 motion and looking through the record, we actually obviously ruled Count Seven is an e-mail to foreign commerce which would be clearly within the --

THE COURT: On its face, the one that goes to Switzerland.

MR. MCGOVERN: The other e-mails would have all gone through New Jersey by virtue of the servers being in New Jersey which would be a sufficient nexus under the controlling case law of the Circuit.

We have a document in evidence that makes a reference to the Whippany office, but it doesn't do what we think is sufficient and we've asked if they would be willing to stipulate so the fact that the Bear Stearns servers were in New Jersey which would cure the problem which was the

essence of the one of the reasons for Rule 29.

THE COURT: You have your application.

This wasn't brought out on your direct case, and there are bigger fish to fry and we raised it in the response to the Rule 29 motion.

So, now you want to have the opportunity on -- to open the case for that purpose.

MR. MCGOVERN: Your Honor, we have a witness here from Bear Stearns who would testify in two or three questions like that the servers were in New Jersey at this period of time.

THE COURT: What would be the phone call, Count Nine.

MR. MCGOVERN: We'll let Count Nine out.

THE COURT: Nine is out. What do you say about six and seven?

MR. MCGOVERN: Seven is established because it's foreign commerce.

THE COURT: You don't need anything for seven. You would need this for what.

MR. MCGOVERN: Five, six -- five and six.

THE COURT: Mr. Butswinkas, what's your position.

MR. BUTSWINKAS: With respect to five and six, they shouldn't be permitted to reopen because it's an element of the offense. It's not like the cases that talk about

jurisdictional nexus this is a little bit different.

THE COURT: It is a limit. Nobody is disputing that.

MR. BUTSWINKAS: I don't think there are any cases where the Government cites in its letter where there is an element of the criminal offense where the Government was allowed to reopen after case is over.

THE COURT: I am troubled by that. You have a Rule 29 motion, this was brought out. The Government rested and now the question is whether or not you should be allowed to reopen to establish an element that arguably you did not establish in response to the Rule 29 motion.

MR. MCGOVERN: Your Honor, we certainly agree with the Court's observation, but we would point that we did cite the *Siembida* case from the Southern District where this type of situation occurred.

THE COURT: I haven't read that.

Do you have a case which said it's permissible to allow the Government to reopen?

MR. BUTSWINKAS: Your Honor, I think that case goes to the issue of jurisdictional nexus, not an element of the criminal offense.

MR. MCGOVERN: Then *United States versus Leslie* from the Second Circuit.

THE COURT: The Second Circuit allowed it to be

reopened. I have to look at this. Tell me what case.

MR. MCGOVERN: Yes.

THE COURT: The normal rule is that the Government rests and you're bound by the evidence at that time.

MR. MCGOVERN: That's true, Your Honor, and we certainly understand that.

THE COURT: If there is a case that you have in the Second Circuit, a case that the Court should allow the Government to reopen to establish an element that it did not establish in their direct case, I'll look at it. I'm just trying to figure out what the law is and apply it.

Mr. Sinclair, are you representing that that's what that case stands for?

MR. SINCLAIR: It's my understanding of the *Leslie* case.

THE COURT: You're telling me, you're representing to me, I haven't read it yet, but I sure will, that the case that the Government can reopen to establish an element that it did not establish on its direct case.

Are you standing behind that proposition?

MR. SINCLAIR: Yes. This is the Second Circuit, Your Honor, that was affirming the district court's decision to reopen the Government's case prior to the time of jury deliberations. There are other cases that say you can do it after jury deliberations.

THE COURT: You have somebody here to testify? It won't take long.

MR. MCGOVERN: Yes.

THE COURT: I will let you do it. I can always toss it later on.

MR. SINCLAIR: The nature of the testimony is very boring. Not prejudicial, Your Honor.

THE COURT: There's a right way to process it. Then I will consider it separately without the pressure upon me to read those cases and to see whether or not I should or should not do that.

MR. BUTSWINKAS: Your Honor, just one point on, I guess, Count Seven. I don't think it's so clear from the face of the e-mail to establish beyond a reasonable doubt interstate nexus there. All it says --

THE COURT: It's okay. But they're not going to produce any additional testimony about it. They're going to rely upon that and it will be an up or down call by me ultimately.

MR. MCGOVERN: There's testimony of this other witness would equally apply to that because it will have gone through New Jersey to Switzerland but that's for another day.

THE COURT: You can bring out whatever you want, I'm just trying to get the record down correctly.

MR. MCGOVERN: Thank you.

THE COURT: Then we'll deal with how it falls out.

MR. MCGOVERN: Thank you, Your Honor.

THE COURT: Do you want to.

MS. EDELSTEIN: I want to point out that there is a subsequent Second Circuit case that addresses the jurisdictional interest for intrastate nexus wire fraud in the Second Circuit it's an open case.

THE COURT: We'll take the testimony and then you can each submit at the time another letter memoranda and we'll read the cases and we'll reflect upon it it.

MR. BUTSWINKAS: Then I think we will conditionally stipulate to what Mr. McGovern says the testimony will be.

THE COURT: Okay. If you want to do that, you can and reduce that to a stipulation.

MR. SINCLAIR: We have the stipulation all drafted.

MR. MCGOVERN: I have one right here.

THE COURT: Then we'll deal with that. It's not going to prejudice anybody here. I can't possibly imagine dealing with that problem.

MR. MCGOVERN: Thank you.

THE COURT: We'll bring the jurors back and we'll get them on their way. Are you prepared to the defendants are prepared to put into evidence what we spoke about.

MS. BEATTIE: Yes. On the documents. The open issue on the document.

THE COURT: What is this issue?

MS. BEATTIE: Remember I said I'd come back to you with a document that goes --

THE COURT: No, no. I thought you made that ruling positive.

MS. BEATTIE: 2659.

THE COURT: What.

MS. BEATTIE: Document 2659, Defendant's Exhibit.

THE COURT: I thought I said that that was going to be okay.

MS. BEATTIE: I said I'd come back to you with a Government Exhibit to which it's related and which it offers conclusions.

THE COURT: This is from Cioffi and Tannin.

MS. BEATTIE: Yes, and others.

THE COURT: What is the issue?

MS. BEATTIE: The issue is the Bank of America deal and when it's going to close.

THE COURT: Look, I will allow this in. Let's move it along. 2659 and the other one you will read that it the jury or you will explain that them to what it is.

(Defendant's Exhibits 2659 and 2661 were marked in evidence as of this date.)

MS. BEATTIE: Your Honor, with all due respect, I would like to take another run at one of the documents.

I think the Government's objection --

THE COURT: Which one.

MR. SINCLAIR: This is the e-mail that's not between any defendant.

THE COURT: An e-mail between third-parties?

MS. BEATTIE: Yes. And the reason it goes to compensation, and Mr. Sinclair objected on the grounds of relevancy, after the Government has put in witnesses and documents all about compensation.

MR. SINCLAIR: No. The objection was hearsay, Your Honor.

THE COURT: The objection was hearsay.

MS. BEATTIE: Initially. And then you came back with relevancy.

THE COURT: I will stick to my ruling.

MR. SINCLAIR: Thank you.

THE COURT: Can't win them all. I think everyone would agree that Judge block was correct 99.9 percent of the times.

MR. SINCLAIR: We may not have a stipulation, I guess.

THE COURT: Are we squared away with that conditional stipulation or do you need some more time? Just take a second, we want to move it along.

Ms. Beattie are we okay with this.

MS. BRUNE: I believe so.

MR. BUTSWINKAS: I haven't seen it if that's what Mr. McGovern says.

THE COURT: That's a joint stipulation.

MR. SINCLAIR: Take a look at it. I don't want them to agree it.

MS. KEELEY: I reviewed it, Your Honor, we're comfortable with it.

THE COURT: Do you want to read that to the jury?

MR. MCGOVERN: We can read it or offer it.

THE COURT: You can read it.

COURTROOM DEPUTY: All rides.

(Jury enters courtroom at 2:13 p.m.)

COURTROOM DEPUTY: You all may be seated.

THE COURT: Okay.

So, I hope you had a pleasant lunch. I have had the pleasure of seeing Alternate No. 1. We didn't speak but we happened to be in the same restaurant. He's a very good alternate, he's all by himself which means he's listening to my advice not to talk to anybody about the case.

We have some finishing touches here first to deal with. During the break, the lunch break, we reviewed these various documents that the defense wanted to put in evidence.

I allowed some and disallowed others, and at

this time we call upon Mr. Butswinkas to put into evidence what we agreed I would allow in evidence for the defendants.

MR. BUTSWINKAS: Yes, Your Honor it's Defendant's Exhibit 617.

THE COURT: This is going to be defendant Cioffi's.

MR. BUTSWINKAS: Just defendants'.

THE COURT: I sort of had them marked Cioffi and Tannin.

MR. BUTSWINKAS: Cioffi 617.

THE COURT: Just one second. It's job that it applies to both, right. And 617.

MR. BUTSWINKAS: Yes, Your Honor.

THE COURT: Identify it for if you want the jurors to hear it either way it's up to you.

MR. BUTSWINKAS: We will use it on our closing.

THE COURT: That's an e-mail.

MR. BUTSWINKAS: Yes. Your Honor, no, it's the marketing.

THE COURT: It's the marketing document.

MR. BUTSWINKAS: Yes.

THE COURT: Okay.

(Defendant's Exhibit 617 was marked in evidence as of this date.)

THE COURT: Go ahead. Next.

MR. BUTSWINKAS: Then Exhibit 1960.

THE COURT: 1960, okay. And characterize that for me.

MR. BUTSWINKAS: That's an e-mail.

THE COURT: That's an e-mail. Those were the two, right?

MR. BUTSWINKAS: Yes, Your Honor.

(Defendant's Exhibit 1960 was marked in evidence as of this date.)

THE COURT: Okay. And there's nothing else that the defendants wish to put into evidence of a documentary nature.

We covered all of that?

MR. BUTSWINKAS: That's correct.

THE COURT: The other thing is that the parties have entered into a stipulation which. You are going to hear that and Ms. Beattie is going to read it now.

MS. BEATTIE: No, Your Honor just two additional documents that you allowed.

THE COURT: I'm sorry, did I cut you short? These are documents for Tannin.

MS. BEATTIE: For Tannin, yes.

THE COURT: I'm sorry. Go ahead let me have them.

MS. KEELEY: Defendant's Exhibit 2661.

THE COURT: 2661.

MS. BEATTIE: And Defendant's Exhibit 2659.

THE COURT: 2659. Just remind me again are those e-mails.

MS. BEATTIE: Those are both e-mails.

THE COURT: Right. I remember that. Anything else?

MS. BEATTIE: Fortunately, no.

(Defendant's Exhibits 2659 and 2661 were marked in evidence as of this date.)

THE COURT: We have all the documents into evidence that will be placed into evidence now.

Then we have this one other piece of business to attend to.

There's another stipulation, Mr. McGovern.

MR. MCGOVERN: There's a joint stipulation between the parties, Your Honor, I think it will pretty much be heard at sidebar.

THE COURT: Something to discuss yet about this.

MR. MCGOVERN: I think she has an objection reading it before the jury.

MS. BRUNE: I think it's appropriately addressed at sidebar if the Court would allow us.

THE COURT: Do you have any problems with the stipulation yes or no?

MS. BRUNE: I would like to address the stipulation. I do.

THE COURT: Is there a problem?

MR. SINCLAIR: Yes.

THE COURT: Should it be read?

MS. BRUNE: Whether it should be read at this point in light of Your Honor's ruling.

THE COURT: I will.

MR. MCGOVERN: It's hereby stipulated and agreed by the parties that Bear Stearns e-mail servers, if called upon to testify, Kim DelVecchio, an Associate Engineer at J.P. Morgan Chase, would testify that she was a Vice President at Bear Stearns in 2007 and that she has knowledge of the firm's e-mail exchange servers.

She would testify further that during 2007, Bear Stearns e-mail exchange servers and Bear Stearns regulatory retention archiving system was based in Whippany, that's W-h-i-p-p-a-n-y, New Jersey, and that all e-mails sent from New York-based Bear Stearns and Bear Stearns Asset Management employees in the first six months of the year 2007 were routed through the servers in Whippany New Jersey.

Finally, she reviewed Bear Stearns's records to confirm that the Bear Stearns e-mail accounts assigned to the defendants, Ralph Cioffi and Matthew Tannin were routed through Whippany, New Jersey through all of 2007.

It's date November 3, 2009, and signed by the parties.

THE COURT: Do we have a number for it?

MR. MCGOVERN: That's Exhibit 586.

THE COURT: It's missing on the list for Cioffi just for no particular purpose but it's listed as a joint stipulation.

(Government's Exhibit 659 was received in evidence as of this date.)

THE COURT: Anything else?

MR. BUTSWINKAS: Mr. Cioffi rests and we would ask to move to closing arguments.

MS. BRUNE: Likewise, Your Honor.

With that, Mr. Tannin rests and we are looking forward to closing arguments.

THE COURT: Any rebuttal case.

MR. MCGOVERN: I don't know how much we're looking forward to closing arguments. We're ready for closing arguments; we don't have any rebuttal.

THE COURT: Members of the jury, what that means is that you heard all of the evidence and the testimony in this case now, and what remains is to listen to the concluding remarks. Sometimes we call it summations by the parties and then to listen to the judge's instructions about the law and then you would be commencing your deliberations.

Now things have worked out very well from a timing point of view. We're going to give you off the rest

of the afternoon so people can go vote, as it turns out, nice and early and I'm going to give you off tomorrow also.

Now, there's a real good reason for that, but I can share this with you. I want to make sure that we have all these legal issues down right so that I can intelligently, hopefully, correctly instruct you about the law and this is the time in the course of the trial when we turn our attention to legal matters so you don't have to be here because you should not be listening to legal arguments and there's much to discuss here.

So, you're going to have tomorrow off. It will also give the parties an opportunity not to be pressured in terms of preparing a concluding remarks. So, it works out very well for all concerned.

Thursday morning at 10 o'clock, you will be here and I know you will be prompt because that's been the way you've been all the time and we're going to hear the Government's concluding remarks at that time.

I'm told Ms. Jaroslaw will be delivering the Government's summation. Nobody will be under any rush or any pressure to do it within a very circumscribed period of time. If I feel during the course of summations, I may egg somebody on to try to wrap it up if I feel it is becoming repetitious.

I want everybody to be relaxed and everybody to feel they're not under any pressure. That means the

jurors as well as the lawyers and the judge, of course.

I think that you can anticipate the better part of two days for summations. After all, we had two defendants and the Government does have the right to have a rebuttal summation.

Now, I'll tell you now, though, I mentioned it it briefly, I think, in my preliminary remarks that the purpose of a rebuttal summation is not to repeat the principal summation. It is exactly what the word sounds like: To rebut whatever the defendants may have said in their summations and it's not to be anywhere near as lengthy as the principal summation. And if I feel that it's going to be repetitious, I am going to instruct the attorney for the Government who will be delivering the rebuttal, I think it's Mr. McGovern, sound like a second summation. So, I'm saying that to you as a cautionary tale to the Government as well so he understands that full well.

I can't tell you how long the rebuttal will be, but it's not going to be more than 45 minutes or an hour tops, I suspect maybe a little less that that. I am told that Ms. Jaroslaw will be delivering the summation for the Government and that will take three or four hours. Also, I just mention this to you so you have a general understanding of what hopefully we will be able to accomplish the rest of this week. And if that be the case, that means that the

defendants will start their summations Thursday afternoon as well.

I suspect that Mr. Butswinkas will be going first.

MR. BUTSWINKAS: Yes, Your Honor.

THE COURT: All right. And then, of course, we're going to be lapping over, undoubtedly, into Friday with Mr. Tannin and maybe something left with Mr. Butswinkas, it all depends on how things unfold, and then we will have the rebuttal by Mr. McGovern on Friday.

The game plan I'm sure this is only structure that I'm establishing here is that we will be finished by Friday at the end of the day. We don't want it to lap over into Monday.

So, I'm not going to allow the rebuttal to happen on Monday morning. It's best that we all are going to have anything before us by the end of Friday and then we'll have the rest of the weekend, hopefully, and then on Monday morning I will firstly instruct you as to the law. It may take about an hour and a half roughly and then you will commence your deliberations.

I have instructed the lawyers to have at the ready a compendium of all the exhibits you're not going to have all the exhibits sent into the jury room you will have a list of they will all and you can call them for them if and

when you choose to see a particular exhibit you will that have before you.

Then the other instructions I'm going to be giving I think will pretty much guide you in terms of how you will go about your deliberations. I will just can tell you right now that the instructions will be basically in three parts.

The first part I will be talking about some principles of law that apply in most cases I will tell you about the burden of proof, the presumption of innocence, reasonable doubt, how to size up the credibility of witnesses, and those the roles once again of the jurors as fact finders and the Court's role as being in charge of the law. You will hear that some of this I already mentioned to you in my preliminary instructions.

Then the second part of my charge is going to explain to you the law in respect to these charges and you will hear about conspiracy, you'll hear about the securities fraud charges. You'll hear about the insider trading charge and there may be some wire fraud charges which, you know, we may be talking about as well but you'll hear about all of that and that will explain the elements of these various crimes that have been charged and then the last part of my charge will direct you to how you're going to handle your deliberations.

Now, it's important that everyone speaks to each other, listens to each other, be civilized and that you need to reason a unanimous verdict on each and every one of these charges up or down.

We'll go through the verdict sheet with you so to explain it all to you and I'm even going to give you a copy of the charge. I'll have it all written down.

Now, the law requires me to deliver all of this it's not that you just get a written document and then go through it all, so the written charge is going to be a guide because I have a tendency to ad lib a lot and what I say orally is going to be the real charge. I don't plan on having it vary substantively with what will be down on the written page and the written page will be a guide for you and I will go through that as well. And then you will start your deliberations and then I turn the proceedings over to you and you'll be telling me whatever you warrant me to consider.

If you want to hear any readback or have some of the testimony brought back to your attention you'll be able to do. Our court reporters will have copies all the testimony and may even give you portions for you to look at in the jury room if that is what you want and it depends on what you are looking for, if anything. You will have all or some of the exhibits as you want them; they will be brought in to you. And if there's any confusion you have about the

law after I explain it to you you can come back and ask for clarifications and you tell me how long it takes for you to complete your deliberations.

The important thing is that you'll be starting on Monday, if all things go according to plans, and you'll take as long or as little as the time you need in order to fully and properly discharge your responsibilities to fully and fairly try the issues without fear or favor, you remember your oath, you take as long as you need to do that.

It's important that you don't have any personal plans that you make for next week that may psychologically interfere with your responsibility to do the right job as jurors in terms of your full and fair deliberation in the case. I think you understand.

Hopefully, that gives you all a good road map of what you can expect and I will tell you that I wasn't going to make a commitment that you will be off this Friday because I wanted to keep flexible to see how things unfold the and it works perfectly to have the summations in before the weekend break.

So, I gave you Friday we will only have part of the summations and that is the right way for me to manage the trial. This Friday we will all be working. You are not going to be off, but you will be off tomorrow.

So, I sound like a broken record but, of

course, it's ever more important now that you've heard everything. You have all the evidence that you may be curious to check out anything. Of course, don't look at the Internet and don't talk to anybody about what you think about, what you think about that. Just keep your thoughts to yourself, keep your mind open, so to speak. Once the bell rings then you can start your deliberations. You can all talk, all 12 of you collectively. That's the beauty of the jury deliberations: 12 good citizens deliberate and listen to each other altogether and hear each other out in terms of the court and jury to do this awesome responsibility that you have.

Get a good rest tomorrow. See you Thursday morning at 10 o'clock.

COURTROOM DEPUTY: All rise.

(Jury exits courtroom at 2:28 p.m.)

(In open court.)

THE COURT: All right. Now, what I'd like to do is just go through the various proposed charges that you've given to me and I guess this will qualify as a continuation of the charging conference.

We already had spoken a lot about some of these issues. Now is the time we're going to speak more about them in preparation for the charge.

Now, just bear with me.

MS. KEELEY: Your Honor, two quick things. First if we could renew our --

THE COURT: Just one second. I'm looking for my laundry list here and for some reason I have -- okay, go ahead.

MR. BUTSWINKAS: We want to make sure we renew our Rule 29 motion.

THE COURT: That's right.

MS. KEELEY: We incorporate by reference the memorandum we filed in support of our original Rule 29 motion.

THE COURT: All right. And I'm going to reserve.

Anything else we have to deal with before we talk about the charge again?

MS. BRUNE: Yes, Your Honor. Mr. Tannin likewise renews his Rule 29.

THE COURT: I haven't ignored that. It's understood that it goes along.

MS. KEELEY: It's so important that I want to make sure the record is clear on all the grounds.

THE COURT: The Court's decision is reserved.

MS. KEELEY: I've said what I now need to say.

MR. BUTSWINKAS: Can our clients be excused during the charging conference?

THE COURT: It's up to them; it's up to you. It's fine.

MS. BRUNE: I'd likewise like to be excused and have my partner, Laurie Edelstein, to the charge conference.

THE COURT: Let's reconvene at 2:45 and we'll go through our laundry list and make sure we don't inadvertently omit anything.

MR. BUTSWINKAS: Thank you, Your Honor.

MS. KEELEY: Thank you, Your Honor.

(Defendants excused.)

(Recess taken.)

(In open court; 2:59 p.m.)

THE COURT: All right. Let's go on the record.

Here's what I've identified as matters which we should focus if our attention on in the charging conference.

The first, defendant Cioffi wants a limiting

instruction on the UC Bank situation.

I've looked at it, it's in Proposed Jury Instruction No. 1. It's a limiting instruction, I have no problems with it. I just want to let you you know that we're going to accept it as drafted.

The Government may or may not have some thoughts about that. If you do, let's hear from you now.

MR. MCGOVERN: I'm looking at it again. I've looked at it the other day. On its face, it's okay. It's basically a limiting instruction that says they're only allowed --

THE COURT: It's on the issue of motive, that's consistent with my rulings. It's perfectly drafted to me. So, we'll put that in. So, we've taken care of that.

I next have a request from Tannin about wanting some instruction concerning victim bias. I don't frankly understand what they're concerned about here.

MS. EDELSTEIN: Your Honor, I believe that you've addressed our concerns in your preliminary instructions that you've drafted.

THE COURT: We talked about that there's not going to be bias one way or the other so we don't have to put that in.

Now, when we deal with the securities fraud charge, what we want to really spend a little time talking

about the request that the defendants have made that they want the charge to say that continuing to hold the security does not qualify as, "In connection with the purchase or sale of securities." And they quote from *Abrahamson*, 568 F.2d, 862. This language which is in *Abrahamson*, "A requirement of fraud in connection with a purchase or sale of securities is not satisfied by an allegation that it was produced fraudulently not to sell their securities."

That's a faithful quote from *Abrahamson* which is a civil case. I don't have any response from the Government, but do the defendants still want that charge?

MR. WIEGMANN: Yes, Your Honor.

THE COURT: Does the Government think it's entitled to that charge? It goes a long way to me granting the Rule 29 motion. All of the Government's cases here deals with statements that were made to induce investors to stay the course and not to sell the securities or not to redeem their securities.

What does the Government say about *Abrahamson*?

MR. SINCLAIR: In the first instance, there is evidence in the record that people did purchase securities after having spoken with the defendants.

THE COURT: Well, do you think that the defendants are entitled to that charge?

MR. SINCLAIR: No, Your Honor.

THE COURT: We have to structure the charge.

MR. SINCLAIR: I think the law is very clear in the statute that the standard is and under the regulations, the relevant regulations, that it's to buy, sell, or hold securities.

THE COURT: That's what the statute says. How do you then address *Abrahamson*?

MR. SINCLAIR: Your Honor, I don't know what the specific concerns were in the civil case, Abrahamson, and the statute certainly any case law to the contrary.

THE COURT: You can't be that glib about it. We have a Second Circuit indication albeit in the context of a civil 10B and 10B-5 case that says the following: "The plaintiffs argue that they are entitled to recover under Section 10B and Rule 10B-5 because they were fraudulently induced not to sell their partnership interests."

I guess the parallel here would be that the defendant, that the investors were fraudulently induced not to sell or redeem their hedge fund.

Continuing in Abrahamson they say that they would have withdrawn from the firm in 1968 if defendants had not misrepresented the true nature of the firm's investments at that time.

The short answer is could this branch of plaintiff's argument is that the requirement of fraud in

connection with the purchase or sale of a security is not satisfied by an allegation that plaintiffs were induced fraudulently not to sell their securities. They cite a Supreme Court case *Blue Chip Stamps*. I'm just trying to use this opportunity today to have a full dialogue on the issue.

MR. SINCLAIR: My initial response to that, Your Honor, is two-fold.

One, it sounds like they're dealing with specific securities in the *Abrahamson* case that may have been charged in that complaint in that particular case.

THE COURT: No. But the concept here that we're talking about is the fraudulent inducement to sell securities. Whether it's a partnership interest or whether it's a hedge fund security. And certainly, a lot of what you have put forward here is that the investors were fraudulently induced by these various misrepresentations not to redeem.

MR. MCGOVERN: Well, Your Honor, it's actually -- *Abrahamson*, I haven't even looked at it, and we would like the opportunity to look at it.

THE COURT: We have the luxury of time.

MR. MCGOVERN: It's a civil case, it's touching upon the same issues we're talking about, reliance and inducement, and those types issues used as a standard for criminal cases in the Circuit is that all it has to do is touch upon the sale.

THE COURT: Now, we'll turn to the defense team, both experienced appellate counsel here advising to address the legal issue.

Abrahamson is a civil case, why should it apply in the context of a criminal securities fraud violation.

MR. WIEGMANN: It's a civil case, Your Honor, but the language of Section 10B and 10B-5 doesn't change. This is a civil case to a criminal case in connection with a purchase or sale, it does not mention anywhere in the statute?

THE COURT: And that's your argument.

MR. WIEGMANN: Absolutely.

THE COURT: What are your names again?

MR. WIEGMANN: Hack Wiegmann.

MS. EDELSTEIN: Laurie Edelstein.

THE COURT: You want to echo that the statute and Rule 10B-5 says purchase or hold or sale or hold a security. It does not, in fact, state that.

We do have differences between the criminal law and the civil law. For example, when we discuss again the issue of whether there has to be actual reliance, that is a civil concept but it's not embraced in the criminal law. It's all embodied in the concept of materiality.

So, there is a difference right now between

civil and criminal. You may not agree with that, but I'm pretty comfortable with that because the issue of materiality basically subsumes reliance, I guess, in the criminal context.

But you say that it needs to be actual reliance.

MR. WIEGMANN: Respecting Your Honor's decision on that, putting aside the reliance issue, there still has to be a connection with or sale nexus.

THE COURT: In connection with reliance, while we're talking about reliance, we read that some interesting -- I don't believe that stands for the proposition that you want to to stand for.

MR. WIEGMANN: I understand your ruling on that, Your Honor.

THE COURT: I'm not going to charge actual reliance, I just want to explain that to you. And, of course, you can argue that in the Circuit court. I'm sure that if there is a connection it will be a 95-page decision from Judge Raggi.

You made your record --

MR. WIEGMANN: Thank you, Your Honor.

THE COURT: -- we need not dwell on that. It's going to be a materiality charge.

Getting back to this language that we have in

Abrahamson, let me call the defense team's attention not only to *Blue Chip Stamps* which reinforces that same proposition and other cases out there that refer to that but the Supreme Court in *United States versus Naftalin*, N-a-f-t-a-l-i-n, in 1979. That's 441 U.S. 768.

In Footnote Six, it says that, "This case involves a criminal prosecution," I'm not going to go into exactly what this case is about, suffice it to say it is a criminal case. "The decision *Blue Chip Stamps versus Manor Drug Stores,*" which is the case that's cited in *Abrahamson,* "which is limited to purchases or sellers the class of plaintiffs who may have private implied causes of action under the Securities and Exchange Commission Rule 10B-5 is, therefore, inapplicable."

So, you may want to take a look at that and the Supreme Court, in turn, cites *SEC versus National Securities, Inc.,* and the citation there is at Footnote Nine at 393 U.S., 467.

All right, so this is a work in progress.

My instincts tell me that Abrahamson is limited to a civil scenario, but the Government will have an opportunity to respond to this and I encourage you to do so because, obviously, the defendants are going to raise that in the Circuit Court of Appeals.

You might as well address it, it's in front of

Judge Block now. It does deal with the charge that I have to prepare. What I'm concerned about is getting the charge down for the record. If there is any issues of law to be dealt with, if the jury convicts, that I can deal with in the context of a Rule 29 motion which I've reserved on, so be it. I just want to make sure the charge is down right now, that's what we're focusing on.

MS. EDELSTEIN: If I can speak to that? I'm familiar with the *Naftalin* decision.

THE COURT: You didn't cite it.

MS. EDELSTEIN: That's because --

THE COURT: Is there any reason why you didn't? Tell me about it.

MS. EDELSTEIN: The proposition that's cited in that Footnote is for the fact that the Government itself does not have to be a purchaser or seller of a security at issue here. I don't believe there's been any contention to that.

In all of the case law, I don't believe there's any distinction between a civil and criminal context and whether or not. You have to have a purchase or sale in connection with the security. I've seen no case in terms of distinction between civil and criminal context.

THE COURT: You're telling me that it can't support a criminal prosecution for security fraud where you have as in this case, let's say, hypothetically that there are

absolute fraudulent misrepresentations or misrepresentations of material facts that you want to come to me and you want to sell your hedge fund securities, okay? And I say, Please don't sell them because I'm telling you right now that they're wonderful and I'm going to invest $3 million of my own funds that I have saved over the years as a federal court judge that I put into the put bank and I don't do it that is criminal activity? That's your position?

MS. EDELSTEIN: Yes. It's right out of the statute, the fact that you need a purchase or sale.

Now, it doesn't have to be the Government that is the purchaser or seller here which is what the point of the footnote in the *Naftalin* case is.

THE COURT: There has to be proof that there actually was a redemption.

MS. EDELSTEIN: There has to be proof of a purchase.

THE COURT: Or redemption would satisfy that.

MS. EDELSTEIN: Yes.

THE COURT: That's a sale.

MS. EDELSTEIN: Based on misrepresentation.

THE COURT: Wait a second.

So, that if there is proof that there has actually been a redemption, you would then say that we're not at all to be concerned about *Abrahamson* because, here, we

would actually have the equivalent of a sale, right?

MS. EDELSTEIN: I think there are two prongs, various elements and we --

THE COURT: Answer my question. Answer my question.

MS. EDELSTEIN: If the redemption was based on a proven misrepresentation.

THE COURT: That's an issue of fact. We have, you know, facts here; I want to know what the law is.

So, if we have a situation where arguing the sufficient evidence you establish that there was a nexus between a representation that was false and an actual redemption, would that satisfy you even under the strictures, so to speak, of *Abrahamson*, yes or no?

MS. EDELSTEIN: Yes.

THE COURT: Only one at time.

MS. EDELSTEIN: Yes. If the redemption was considered a sale and that's a separate issue.

THE COURT: Do we have a separate issue?

MR. SINCLAIR: We disagree with the proposition.

THE COURT: I know that you do.

MR. SINCLAIR: Yes.

THE COURT: Let me ask you whether there are actual redemptions here.

MR. SINCLAIR: Yes, there are actual redemptions.

There are actual subscriptions here.

THE COURT: There were actual redemptions or at least they have put in for redemptions to manifests a sale here.

MR. SINCLAIR: Yes. Absolutely, Your Honor.

There's also purchases. There's also Exhibit 71 which is a purchase.

THE COURT: We're not talking about purchases here. We're just talking about future sales. The question is whether I should carve out a charge that sort of reflects *Abrahamson* and focuses upon the fact that they have to establish here to be satisfied that there were actual misrepresentations that relate to these redemptions.

MR. SINCLAIR: I don't think so, Your Honor.

I think that your questions would have crystallized the issue right because the reason why there's a difference between the civil and the criminal context and why maybe, in the civil context, it requires a sale or purchase for the monetary component because that's what people are looking for in civil cases.

THE COURT: There has to be a way of getting monetary relief.

MR. SINCLAIR: In criminal cases, if it's pointed that you were lying to your investors and they just don't do anything about it because they're lulled into a sense of

confidence, certainly, that has to be prescribed by the law.

THE COURT: I'm going to exhort you to really seriously address it.

MR. SINCLAIR: We will. We appreciate that.

THE COURT: You do have in language, and I am just trying to lay out the landscape here. We have the luxury of time.

My inclination is that you're right, that I could shape a charge here to conform to the evidence in this case, so to speak, concerning redemptions. You have a lot redemptions, I putting in an application for redemptions, you know, or redemption certificate, whatever the right language is, would qualify as a sale. It's one thing I could possibly do especially since defense counsel agrees that would be perfectly appropriate.

MR. WIEGMANN: I don't agree with that.

THE COURT: One of the team members agrees, the other does not.

MR. WIEGMANN: From our position, Your Honor, there would have to be a purchase in this case because of the fraudulent representation.

THE COURT: A purchase.

MR. WIEGMANN: There would have to be a purchase, not a redemption.

THE COURT: You can argue there's no purchase.

We're not going to change that, we're just going to talk about it here.

MR. WIEGMANN: Holding is not enough.

THE COURT: The allegation they were induced fraudulently to sell their securities, they were induced fraudulently not to purchase securities.

MR. WIEGMANN: They have to have been fraudulently induced to purchase in connection with the security.

THE COURT: To purchase and to sell.

MR. WIEGMANN: Here, Your Honor, there's no allegations.

THE COURT: You're saying that to be fraudulently induced to purchase and sell.

MR. WIEGMANN: A purchase. A sale is not relevant here because they're not contending anyone was induced or wrongfully induced into redeeming. They're alleging someone was wrongfully induced into purchasing or holding, not redeeming.

THE COURT: Well, I'm a little confused. I thought that, you know, there's a lot of evidence here that, you know, they were trying to encourage them not to redeem them.

Am I missing something?

MR. SINCLAIR: They were attempting to encourage them not to redeem, that is correct, Your Honor. That's correct.

That's holding.

MR. WIEGMANN: Not redeeming is holding. People were encouraged hold.

THE COURT: Not to sell?

MR. SINCLAIR: They were also encouraged to add more money.

THE COURT: Redemption is equivalent to a sale.

MR. WIEGMANN: Redemption is an actual sale. They're not contending anyone we defrauded into selling. It was lack of sale and we contend that is not enough.

THE COURT: There has to be a redemption certificate.

MR. WIEGMANN: All are purchases here.

MS. EDELSTEIN: I think this is confusing. We're actually in agreement. My statement about the fact that if there is a sale that was in connection with or based on a misrepresentation under the statute, that would be sufficient under the facts here, though, any of the redemptions that took place, even if they were to qualify as sales under the statute, were in spite of or despite any alleged misrepresentations.

They were not, therefore, in connection with the purchase or sale as is required under the law. So, that's why we're actually saying based on the facts in this case there really is the allegations are not.

THE COURT: They are not induced to purchase. That all the securities were purchased.

MR. SINCLAIR: They were purchased and there were additional purchases made after they were lied.

THE COURT: I know the crux that you have here is that these investments were in place and all of this other stuff happened and the thrust of the Government's case, I understand it clearly, is that they said hold and don't sell putting more money in. You made all sorts of misrepresentations to keep them from redeeming. I mean, isn't that what the case is about?

MR. SINCLAIR: Yes.

THE COURT: The question is whether that constitutes a crime under the securities laws and you say no.

MR. SINCLAIR: We're pretty confident about this, Your Honor.

THE COURT: That's a real defining part of my charge, you see, because, you know, I'm inclined to agree with the Government. It just doesn't make intuitive sense in the context of criminal law that people can lie all they want to. I'm not saying that's what happened here, that's not in my domain, and actually deter people from cashing out their securities. That's not what my intuition is. This can't be the law here.

MR. SINCLAIR: We will write a letter this evening.

THE COURT: You can go into that direction, you know what my thoughts are. And it will be interesting to see what Judge key says and Judge Raggi says.

MR. WIEGMANN: One other point, Your Honor. There were lots of other statutes, lots of laws that criminalize holding. The securities law in 10B does criminalize holding.

THE COURT: All do you is cite *Abrahamson*.

MR. WIEGMANN: We will give you more authority, Your Honor.

THE COURT: You know what I'm trying to do. I'm trying to focus everybody's attention and what I think may be points one, two, or three for the Circuit court to see that we get the charge down right because we don't want to have to try this case again so the Government has to be very mindful of that as well.

If you think you can live with the language in *Abrahamson*, that's your judgment call to make. I'm telling you to make it, that's your position here, and I got to call the shots and make the hard calls, I understand that. We are all sensitive to the fact that we don't want to have to try the case again.

MR. SINCLAIR: Of course.

THE COURT: I look forward, sorry to make you work tonight, but that's what you signed up for.

MR. SINCLAIR: Of course.

THE COURT: We dealt with that, you know my take on the reliance issue. I'm not going to go with that summary order statement in *Schlisser* that arguably is an open issue. I think that the materiality subsumes everything and the defense can argue all they want to in terms of trying to tell the jury it can't be material, and I think that reliance factor is absorbed short of actual reliance which I don't think is the criminal law here so you can expect that.

Now, we are, in terms of my checklist, and then after I finish you tell me if there is anything that you thought about that I may discuss here.

On materiality, we know that we have the issue as to whether I should make a reference to a hedge fund here.

My sense is that is not to use the words "hedge fund." It's to say whether this might be a reasonable investment if these particular funds. I think that's the fair way to focus it. You're not talking about other funds, so I'm going to put that in. And then the we'll put in Hindsight Clause. I think that's reasonable based on hindsight I will embrace that from defendant's proposed charge.

MR. SINCLAIR: Your Honor, I apologize, I just didn't hear you.

THE COURT: Hindsight clause.

MR. SINCLAIR: Does the Court mean --

THE COURT: The Hindsight Clause. Thanks for stopping me because I'm going too fast and I want you to stop me.

Then the last part of the materiality charge we'll focus on whether I'm going to talk about gullable buyers or sophisticated investors and I think that the Government is right that I should not let the jury believe that these are sophisticated, you know, investors or that when we talk about reasonable investors, we're talking about those that have particular sophistication, and so there won't be language here about we're not going to be talking about only, well, I won't say it doesn't matter, whether the intended victims were gullable buyers or sophisticated investors. The standard is, once again, what a reasonable investors in these particular funds. You have your exception.

MS. KEELEY: (Nodding).

THE COURT: I'm going to go that way. Because otherwise, the jury can really believe that, you know, that you are to consider the wealth of these people and only the wealth of these people and that would not square with the law. So, I have to deal with that in fairness to the Government.

MS. KEELEY: Just for the record, Your Honor, we just did want to confirm our exception and also reference the

fact that the securities regulations specifically provide regulations about who can invest in funds like this.

THE COURT: Regulations what?

MS. KEELEY: The securities regulations provide who is permitted to invest in these funds for just this reason as we heard this morning from Professor Hubbard. He testified it is a proxy.

THE COURT: If you want to propose something that's taken from the law that talks about who is permitted to invest in these funds, I'll consider it. What he said was that anybody with a lot of money can do it. You don't want me to say that, do you?

MS. KEELEY: Your Honor, under the securities regulations there are specific qualified investors for funds such as this. In fact, these funds had two qualifications, but we will submit some instructions to them.

THE COURT: You submit to me some definition on who a qualified investor is. I will consider it, but I suspect it's going to talk about what? The amount of money?

MS. KEELEY: It is, Your Honor, based on their net worth and investable assets; correct?

THE COURT: Of a qualified investor.

MS. KEELEY: Correct.

THE COURT: That's not inconsistent with what the Government is saying a qualified investor is. Can we have

all this money in the world --

MS. KEELEY: Right.

THE COURT: -- to embrace that.

You you want me to consider something like that, you can submit it to me.

MS. KEELEY: Thank you, Your Honor.

THE COURT: Be sure my object in charging the jury would be to make sure they're not misled into believing that just because somebody has big bucks that's the standard to be used that's the consent we're talking about.

MS. EDELSTEIN: We take exception to that, Your Honor. In you're Proposed Instruction No. 7, we actually proposed the definition of who a reasonable investor in a Hedge Fund like these funds would be and we lay out that it's not just an issue of money here or wealth, that we --

THE COURT: What specifically, do you want me to charge the jury? That would be in keeping with what we just spoke about.

MS. EDELSTEIN: As we stated in our Proposed Instruction No. 7, we said, "You have heard about the funds in this case were not open to ordinary investors, only those investors who had at least $5 million in investments or who owned or managed $25 million in investments."

THE COURT: Stop. You want me to say a reasonable hedge fund investor is a highly sophisticated investor?

MS. EDELSTEIN: Yes. Because it's not an issue of wealth, it is an issue of experience in financial matters.

THE COURT: I am not going to say that, okay? The jury will decide what a reasonable investor is. You can make your arguments to the jury all you want to. I'm not going to preclude you from doing that, but I think that it would not be correct for me to instruct them that it has to be a highly sophisticated investor.

I think that based on the testimony that I heard from your expert witness that money is the name of the game here. Essentially, that's really what hedge funds are. If any of you folks won the lottery, as Mr. McGovern said, you would be able to invest in these hedge funds there is no question about it. So, the charge would be crafted accordingly.

Okay, let's move on to something else.

I am going to give the three methods by which fraud can be established. I asked the Government to opine on A and C in addition to B. They convinced me it's probably the right thing to do. I think the jury has to be unanimous, though, as to which one of these three methods that they pin liability on.

MR. SINCLAIR: That's my understanding of law, Your Honor.

THE COURT: They will be charged accordingly.

There's enough here for the Government to argue, and once again, we have the Rule 29 motion that I reserved on so we can flesh it all out in terms of what is sufficient evidence to support this.

Whether I should prepare the verdict sheet to require them to identify which of those three they agreed to I'm open to that. It may not be a bad idea.

MR. MCGOVERN: You know what, Your Honor, we'll look into that in the overnight as well I'm entirely sure in the case law whether that's necessary or not.

THE COURT: I think I may have some discretion to do that.

MR. MCGOVERN: Whatever guidance we can offer. I don't want to be in a position where we're agreeing to something right now that we haven't looked at because it might make a difference.

THE COURT: Think also tonight about the verdict sheet.

MR. MCGOVERN: Yes.

THE COURT: There's some value perhaps in separating off those questions to see which of those three they really come to rest on. My initial feeling is it may not be a bad idea so think about that.

All right. Let's move on. Venue here. The issue has been raised throughout the trial. My guess is that

the defendants are entitled to a venue instruction on the securities fraud. I think that was left open for them.

MR. SINCLAIR: The securities and the conspiracy count.

THE COURT: Yes, conspiracy.

So, I think that they're going to get the venue charge on that, all right. Venue is a tricky thing, is it or is it not an element? It it is not yet, it's essential to charge it and I always feel that some are conceptually confused by that throughout the years and there's a view of the law that says, "Under certain circumstances when venue is not an element," and if you don't charge it, it's not favorable. We're going to charge it here and worried about how that plays out if at some future time.

MR. MCGOVERN: Just to be clear, because there is some confusion by preponderance of the evidence, I'm assuming.

THE COURT: The venue is the preponderance of the evidence standard. I think if I recall --

MS. KEELEY: Your Honor, we acknowledge that that's the Second Circuit law. We're preserving the issue since the Supreme Court hasn't ruled on it.

THE COURT: I think that whole area is screwy and hasn't been definitively resolved by the Second Circuit. I don't think -- we'll save that for a discussion at some sort

of a law-related function.

I have a note here that Cioffi wants the good-faith reliance to embrace advice of counsel. I'm not inclined to do that. I don't think we have an advice of counsel scenario here to justify a charge, so I will just let you know what my thoughts are about that.

MS. KEELEY: Your Honor.

THE COURT: Yes.

MS. KEELEY: If we may speak to that? Mr. Quental testified that the PPM was authored by Sidley & Austin [sic]. I believe he said both drafted and blessed by Sidley & Austin.

THE COURT: You can argue about that I am not going to charge that specifically.

Now let's talk about aiding and abetting and we'll talk about Pinkerton and whether we're going to end by revisiting once again the insider trading issue in terms of whether there's a so-called fiduciary responsibility to make disclosures and things of that nature.

But on the aiding and abetting, the Government wants aiding and abetting including the wire fraud charge or can we make it easier for the jury without getting some so confused?

MR. MCGOVERN: We have aiding and abetting as to the substantive counters in the indictment. I think there's

a theory upon which --

THE COURT: Aiding and abetting you're talking about the substantive security charges.

MR. MCGOVERN: Yes. Aiding and abetting a conspiracy.

THE COURT: I will give that to you, but do you also need that for the wire fraud and is there a realistic view of this case where aiding and abetting were determinative in terms of a wire fraud conviction.

MR. MCGOVERN: Well, for instance, if the jury believed that Mr. Cioffi was behind, you know, sending the message out to the investors about whatever the misrepresentation might have been and Mr. Tannin was his mouth piece or Mr. Tannin was the person actually doing it. He would be aiding and abetting Mr. Cioffi.

THE COURT: I think that's correct. There is a view of this case that would support that I will give it. I just want to ask whether -- do you want to speak in opposition to all these things?

MS. EDELSTEIN: Yes, not all of them.

On this in particular issue, as we stated in our Rule 29 brief, we just don't believe that this is an aiding and abetting case with respect to any of the charges here.

THE COURT: I know you say that but, you know, why

not?

MS. EDELSTEIN: Because --

THE COURT: On the subsequent securities fraud, I give a lot of credit to lawyers who gets up and say we don't oppose everything, we oppose some things, but here's why we oppose these things. It lends credibility to, you know, the lawyering process.

MS. EDELSTEIN: In fact, I stated initially that I was not objecting to everything.

THE COURT: That's good, aiding and abetting in terms of security fraud. Tell me why that should not be charged. Because the evidence of securities fraud with respect to both defendants is so clear cut that they're bound to be convicted on direct evidence and they don't need to be aiding and abetting.

MS. EDELSTEIN: No. It's because the evidence here and the Government's theory that they were working together and not necessarily proceeding on an aid aiding and abetting theory.

THE COURT: They have the conspiracy charge and an aiding and abetting charge so they can say that there is no conspiracy, that they were working separate, you know, but that one aided and abetted another.

MS. EDELSTEIN: We don't think the facts --

THE COURT: Try to do better when you make an

objection.

MS. EDELSTEIN: Okay.

THE COURT: You can do better than that.

The Pinkerton. Now, you wanted to rail against the Pinkerton charge, I will let you do so.

That's something you have some discretion on. What do you think?

The Government has asked for a Pinkerton charge so that for argument's sake, Mr. Tannin is a member of the conspiracy and it's reasonably foreseeable to him that Mr. Cioffi were actually engaged in security fraud that Mr. Tannin can be found substantively guilty.

Do you understand that, yes?

MS. EDELSTEIN: Yes.

THE COURT: Should I give that charge or not? Have you thought about that?

MS. EDELSTEIN: We have thought about it and we object to the charge. But we understand that Your Honor proceeds with it.

THE COURT: It's sort of wearing sort of like a belt and suspenders here I think but it's not an inappropriate charge to give. So, I'll probably give the Pinkerton charge, all right?

So, then let's turn now to this issue that has caused a lot of discussion and that deals with the issue of

fiduciary duty.

This only deals with Mr. Cioffi.

MR. SINCLAIR: That's correct.

THE COURT: So, we're talking about an insider being one who comes into possession of material, confidential, nonpublic information about a security, et cetera. And that's the basic charge that's in the charge book. Sand talks about confidentiality and nonpublic, so I think the issue focuses on confidentiality.

Here's what the Government wants me to say about confidentiality. "A relationship of trust and confidence sometimes called a fiduciary relationship can exist in a variety of settings." I guess that's a truism, right?

Next, a person has a fiduciary duty when the business he transacts or the money or property which he handled is not his own or for his own benefit but for the benefits of another person or entity.

Let's see what the defendants say. This is what nonpublic was, I don't think there's any question about that.

MR. WIEGMANN: Your Honor, we're not sure exactly what the negative nonpublic information is, so I just wanted to state that for the record. The Government hasn't, in our view, made clear at all what the negative nonpublic

information is. A hedge fund always has nonpublic information. The question here is what's the negative nonpublic information that Mr. Cioffi reportedly traded on.

THE COURT: What's nonpublic? I'm sorry what's your concern?

MR. WIEGMANN: Our concern is we don't know what the negative nonpublic information that Mr. Cioffi reportedly traded on was. A hedge fund always, as Professor Hubbard testified, always has some nonpublic information. It doesn't mean that it's neglect of it. It would only be negative nonpublic information that would cause him to presumably engage in insider trading. So, the Government can argue that --

THE COURT: The nature of this conflict about the confidentiality. That's what I was concerned about. Here's what the defendant puts forward here:

"At the heart of the fiduciary relationship lies reliance and de facto control and dominance.

A fiduciary relationship arises where one party has the power and opportunity to take advantage of the other because of that other's susceptibility or vulnerability.

In order for a fiduciary relationship to exist, the fiduciary must have discretion or the authority and the other party must depend on the fiduciary to serve his

interests.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary obligation to the other."

I am just sort of ruminating here. The charge that we have in the standard charge which I gave you simply talks about.

MR. SINCLAIR: Your Honor, I think it's Page 29, Line 7.

THE COURT: Page 29.

MR. SINCLAIR: I believe this is what the Court is looking for.

THE COURT: It just simply talks about the first element and defines an insider as a person who comes into possession of material, confidential, nonpublic information that is a secured by a relationship that involves trust and confidence. That's the standard charge.

The question is whether I should modify that in any respect here? I can just give the standard charge and let the parties argue that, you know, about it. That's a correct statement of law. What's wrong with just doing that?

MR. SINCLAIR: Your Honor, we have no objection to that.

THE COURT: Yes.

MR. WIEGMANN: Your Honor in our view --

THE COURT: You think that's wrong --

MR. WIEGMANN: Yes.

THE COURT: -- to charge the jury that way.

MR. WIEGMANN: It's wrong because it's incomplete.

THE COURT: Tell me what you think it should be.

MR. WIEGMANN: Our first position is our main position. Is first there has to be a duty before that's an obligation to disclose. And so our initial instruction was at Page 40 which was to instruct the jury that there is no fiduciary duty to the individual investors, the duties is to the fund that would be Your Honor.

THE COURT: Now, I ruled on that already. I am not going to go in that direction so I passed that on. You'll argue that there is no duty at all, they can do whatever they want. I don't think the Second Circuit, as I recollect, is going to buy that.

MR. WIEGMANN: The other argument there has to be some duty to disclose. The question is: What is the source of that duty? And if they need to establish that these individual investors that there is a fiduciary relationship and based on the sophistication of the parties, the fact in a these managers were not --

THE COURT: We're talking about confidential. There's nonpublic information here in this case, I'm not concerned about that. Obviously, if it's public, you know,

then we don't have to worry about this. So, that's for the counsel to argue.

But it's the concept of confidentiality once again and we discussed that yesterday and that's really the heart of what you're saying, I think, that when two comes to these hedge funds, there's no confidentiality aspect to them.

MR. WIEGMANN: I don't think it's about confidentiality, Your Honor, I think it's about a duty and silence in the absence of a duty.

THE COURT: Let me ask you this. There's no duty to disclose, specifically. You're not relying upon any omissions, I don't think, are you?

MR. SINCLAIR: Your Honor --

THE COURT: They don't have the duty to disclose and that's not the crux of your case here. That would be something that would be relevant to talk about there were occasions.

MR. SINCLAIR: They have a duty to speak the truth and to the extent they speak and they make material misstatements that is their duty.

When you're speaking in connection with a purchase or sale of a security, and we don't have to go back to that, but when you're speaking in connection with these issues when you say something is misleading.

THE COURT: I agree with that. I don't think you

have the case where you're relying upon fraudulent omissions here. Your case is really very focused. These are fraudulent misstatements of material fact.

MR. SINCLAIR: Yes, absolutely.

THE COURT: So, I can satisfy the defendants' concern by saying we're not dealing with fraudulent omissions here.

There's no duty that they have to make any particular disclosure, this case is really all about what they did say. I think that's really what we're talking about and that may satisfy the defendants.

MR. SINCLAIR: With respect to the insider trading, Your Honor, an omission fact that Mr. Cioffi didn't tell anyone he was trading his information and under the insider trading law there is a duty to disclose or abstain from trading.

So, while perhaps Mr. Cioffi did not have to disclose that the fund were going down and were suffering and were not being able to take advantage of the buying opportunity.

THE COURT: Let's focus on that. Do you think you had a duty to make that disclosure as a matter of criminal law?

MR. SINCLAIR: If he was going to trade, yes, or disclose the information that he was trading Bated on. He

lad a trade or disclose the information or disclose the trade but not the information it was up to him.

THE COURT: What do you say?

MR. WIEGMANN: In the hedge fund context, we don't believe that's the law, Your Honor. The omissions part currently in the main securities fraud counts, there is an omission inclusion and we've objected to that and for the reason, Your Honor, just stated we think those just come out in the main claims in the insider trading context the private placement memorandum specifically said that he could redeem at any time without notice to investors. So, there's no deception here and there's no because there's no duty.

THE COURT: You can argue that to the jury.

Look, I think the charge is correct you can always flush there out later on you can say that in the context of this case, that, you know, there was no obligation to disclose whatever you have so I think the charge is correct and I am going to go with the standard charge because I think that's boilerplate and that's what I'm going to do.

Okay?

We'll reflect upon all of that further during the course of the next day or so. If you wanted to submit anything to me for reconsideration, by all means feel free to do so.

Now, is there anything else here that needs to

be spoken about to satisfy whatever concerns you may have so you can properly prepare for your summations.

First, from the Government's perspective.

MR. MCGOVERN: No, Your Honor.

THE COURT: I think we're ready to go mostly because Ms. Jaroslaw is not here and we can say we're ready to go.

She's working right now.

MR. MCGOVERN: She's doing something.

THE COURT: You can communicate to her what we're talking about.

MR. MCGOVERN: I will.

THE COURT: Go ahead. Anything further from the defendants?

MR. BUTSWINKAS: We have a number of objections to the draft charge which was provided to us last night.

THE COURT: The draft charge is perfect but go ahead. It's perfect in terms of it's just the law that's been charged over and over and over again.

MS. KEELEY: It would be perfect, Your Honor, we would agree in some cases but not based on the facts here.

THE COURT: Tell me what else you want me to consider. Let's go.

MS. KEELEY: To begin with. With respect to the conspiracy, the Government in response to the Court's order

has specifically identified that there were only two alleged co-conspirators in this case.

The two defendants, Mr. Cioffi and Mr. Tannin. The draft charge continues to have and others language.

THE COURT: So we'll eliminate that.

MR. SINCLAIR: That's fine.

THE COURT: That's fine.

MS. KEELEY: I believe that also requires that much the much conspiracy charge to rephrased to make it clear that there were only two alleged conspirators.

With respect to the Government elected to bring two charges here, one for each hedge fund. As Your Honor will recall, we moved to dismiss one of those charges on multiplicity grounds pretrial the Government opposed that and Your Honor denied our motion.

Given that there are two charges, the jury has to be made clear to the jury that what they have to consider and unanimously agree upon either for Count Two that a High-Grade investor heard an alleged misrepresentation concerning the High-Grade fund and then bought a High-Grade security for Count Three that an Enhanced investor heard a misrepresentation about the Enhanced Fund and was induced to buy a securities in the Enhanced Fund.

They continue to mesh the two funds as if they were one. They have alleged misrepresentations going to a

High-Grade concerning the Enhanced Fund going to a High-Grade investor who purchased a High-Grade security and claims that establishes securities fraud.

THE COURT: We should separate two and three and maybe the draft charge doesn't sufficiently call attention to the jurors that they have to consider them separately. I think that's a valid constructive suggestion. But you're telling me that they have to be told that the misrepresentation relates to purchase of each of these securities.

MS. KEELEY: Yes, Your Honor. Under the Government's theory of this case, it goes back to the holding willing issue. Even if the Court overrules us on the holding issue, it has to relate to a fund.

THE COURT: I want to make it clear that it's about each of the funds. They are each subject separately.

MS. KEELEY: They're not each subject to a separate charge but to give an maybe a more simple example in the hedge funds. If you're talking about two different corporations, you can't say I lied about American Express and you went out and bought Apple and, therefore, you're going to make a securities charge relating to your purchase of Apple. It has to be a lie about Apple because that's the securities you purchased.

THE COURT: It has to relate to that particular

charge and that particular fund.

MR. SINCLAIR: I think we agree with the Court. I mean counsel is trying to draw some technical distinction. I think that the evidence in this case really shows that these two funds are very vial correlated. So misrepresentations about one fund may or may not have impact investors.

THE COURT: I will give them some cautionary comment about that be careful that you don't commingle the two when you separately consider them.

MR. SINCLAIR: Thank you.

THE COURT: That you don't take from Peter and pay Paul, that type of thing. That's a corrective suggestion.

MS. KEELEY: I would point that both the Government's representations that they opened on the alleged misrepresentation concerning Concord only related to redemptions in the Enhanced Fund and Mr. Cioffi's transfer came out of the Enhanced Fund.

THE COURT: That's a good thought. I'm going to remind them that they have to consider each of these separately and make sure that they predicate any of the determinations upon commingling, you know, these funds and confusing one with the other type of thing. We'll find some language to give them, okay.

MS. KEELEY: In addition, Your Honor, we object to the charge for the conscious avoidance.

THE COURT: There is a conscious avoidance instruction language in the proposed charge.

MS. KEELEY: On Page 19.

THE COURT: It's not my intention to give a conscious avoidance charge.

MS. KEELEY: Thank you, Your Honor.

MR. SINCLAIR: 2 through 10.

THE COURT: I'm looking at 19.

So, you're objecting to the Line 69.

MS. KEELEY: Lines 2 through 10 actually, Your Honor.

THE COURT: All of it, yeah. Yeah, that's a conscious avoidance charge. I indicated I'm not going to give that here you can argue whatever you want but I won't give the charge.

Okay. What else?

MS. KEELEY: In addition, Your Honor, we would object to the inclusion of a statutory purpose language.

THE COURT: Where is that?

MS. KEELEY: That is in the first element of the securities fraud charge. Fraudulent act, Page 12. It's where it begins.

THE COURT: Just one second. I usually don't really say too much about the history or the reasons for the enactment of a statute. Let me take a look. I don't think

there's anything wrong with giving the jury a sense of that.

MS. KEELEY: The concern, Your Honor, is that the jury believe it can convict based on what purpose the statute is as opposed to the elements of the statute that Your Honor is going to instruct them on.

THE COURT: Usually, I just confine my charge to the elements of statute.

MR. MCGOVERN: Your Honor, I don't think that this actually harms in any way. It really identifies the issue of how these instruments are treated differently under the law rather than on something else. Having heard Your Honor give the charge in the past, I think it actually gives some color to what it is that you're charging them on.

THE COURT: I'll rethink it. I'll think about it. Anything else?

MS. KEELEY: Yes, Your Honor. We object to the other individuals not on trial.

THE COURT: We're going to take care of that. That's just part of the proofreading.

MS. KEELEY: As well as the instruction. Not just and others handling, there's an instruction in there titled, "Other individuals not on trial," which we object to.

THE COURT: Let me see specifically. This is all boilerplate stuff.

That's sort of standard stuff you don't want

that in there.

MS. KEELEY: Again, Your Honor, it goes to the fact that there are only two alleged co-conspirators. So testimony other individuals involved in criminal activity.

MR. SINCLAIR: The Government would request that that be included given the fact that the defense made such a big deal in opening about Mr. McGarrigal's presence at certain times.

THE COURT: I will give that. There are a lot of people who seem to be criminally culpable here.

MS. KEELEY: We would simply make our objection.

THE COURT: You have your objection. Anything else?

MS. KEELEY: We would request that the jury be instructed that materiality is an element of securities fraud. I believe Your Honor has --

THE COURT: It's in there.

MS. KEELEY: You have materiality in the charge, but it's not specified as one of the elements of secures fraud for the jury where you set forth in the beginning.

THE COURT: Wait a second. You're telling me that I left out an element when I charged the jury on securities fraud. I'm very concerned about that.

MS. KEELEY: On securities fraud, Page 13 to 14 where you have the elements of the offense, materiality is

not listed. It's addressed down below as part of the first element.

THE COURT: Well, we have made statement of material fact. What are you talking about?

MS. KEELEY: Subsection A and Subsection C also requires materiality. My concern is that if the Court doesn't set it out as an element separate and apart from the first one there, they're going to think that it evenly relates to Subsection B.

THE COURT: How would you talk about materiality when you talk about engaging in an act or practice or course of business about where there's a fraud? I mean, what does that have to do with -- materiality has to deal with statements that are made. This is exactly the way charges are prepared here. I don't understand what you're talking about.

MR. SINCLAIR: This is the standard.

THE COURT: We know this is the standard.

MS. KEELEY: Part of the confusion, Your Honor, may be created by the fact that this case really, Your Honor, has alleged misstatements which must be material and not about as in Sections A and C a device, scheme, or artifice to defraud or act practice --

THE COURT: That's the first charge, that's correct that's exactly what the law is. To accomplish of any

objective and of course the second element it has knowing and willfully done with the intent to defraud.

MS. KEELEY: We would also request that with respect to the securities fraud charge that the court include the language that we included in our proposed instructions that the misrepresentations must have some direct pertinence to a securities transaction. Evidence that defendants made untrue statements and material fact following an investment in the funds is inadequate. Likewise, evidence that investments.

THE COURT: What's inadequate? If they made a material misrepresentation it's inadequate?

MS. KEELEY: It's inadequate if it's untrue statements material fact following an investment in the funds is inadequate. This is the holding issue.

THE COURT: One second. That is the holding issue, we discussed that already.

MS. KEELEY: Yes. We preserving on that.

THE COURT: What else?

MS. KEELEY: With respect to the second element.

THE COURT: Of securities fraud.

MS. KEELEY: Correct. And let me try to got a page for you, Your Honor. As we stated earlier, and it sounds like the Government has now agreed, we think that the omission language should come out of this instruction.

THE COURT: Tell me specifically what you're talking about.

MS. KEELEY: For instance on Page 15.

THE COURT: Fifteen.

MS. KEELEY: In certain places it talks about a misrepresentation or misleading omission.

THE COURT: Well, that law is correct. I mean, you can argue that there are no misleading omissions here. The Government wants to argue that there were omissions.

MS. KEELEY: We have not, for starters, we have not heard the Government articulate -- in fact, I heard the Government just said in response to Your Honor's question they are not rest on mission.

THE COURT: When taken in tandem with the actual statements that have been made to the investors that that really was triggered, you know, the fact that there was information that they omitted telling the investors in the course of speaking to them that they feel that, you know, something that they should have disclosed to the investors. You can argue back and forth.

MR. WIEGMANN: Your Honor, may I be heard on that just for one second.

THE COURT: Yes.

MR. WIEGMANN: Even with respect to particular items, there has to be, even if there's a duty generally to

the investors, you would need a duty to disclose particular items.

For example, internal fund deliberations are not things that have to be disclosed there is no duty.

THE COURT: Nobody says it has to be disclosed. It's not material then you, you know, of course they don't have disclose.

MR. WIEGMANN: It's not an issue of materiality if thinking about a corporation is anything about being bought out.

THE COURT: You can argue that on this record. There is nothing here that would support the jury's verdict that there is a material misrepresentation of a fact or that there's a material misrepresentation or failure to, you know, disclose a material fact.

I mean, I guess you can argue all of that, but I think the charge is correct and you're telling me the charge is not correct because it will allow the jury to render a verdict based upon the use of the word omission here when there cannot be any omission. But, you know, it doesn't work that way.

I mean, as long as the charge is correct and it gives the jury the legal right to return a verdict based upon the facts of this particular case, then the charge is correct. You're talking about the fact that something has

been added to the charge which is not relevant to this case because there is no such thing as omissions here.

MR. WIEGMANN: In the context of the facts proven, we think that that's correct Your Honor.

THE COURT: I was thinking about eliminating that. Do you want to eliminate the consent of material omissions and safeguard the possibility that you may have to retry this case before Judge Korman.

MR. SINCLAIR: We have no worries this b that.

THE COURT: You're worried about anything. They're not worried about the fact that case comes back. You're not worried about the fact that it's going to be affirmed.

MR. SINCLAIR: As you pointed out, this is a large part of the statute.

THE COURT: The heart of your case doesn't focus on omissions.

MR. SINCLAIR: I can give you an example if that would be helpful.

THE COURT: You gave me one before. Give me another.

MR. SINCLAIR: On the April 25th conference call, Mr. Cioffi says, "A couple million dollars in redemptions for June 30th." That's an affirmative misrepresentation, but it's also an omission because you couldn't mention the fact that there are redemptions for may and there are redemptions

for July at that time. So, it's both and so the jury can find both it's a simple example.

THE COURT: We'll, let it go this way.

Anything else?

MR. WIEGMANN: Would you like me to address that hypothetical, Your Honor?

THE COURT: No, no because I'm not going to change the charge. You have your exceptions.

MS. KEELEY: Yes, Your Honor.

MR. WIEGMANN: Thank you, Your Honor.

MS. KEELEY: On 16, going to the top of 17, where you discuss the second element about an intent to defraud.

THE COURT: Yes.

MS. KEELEY: We would request that that say intent to defraud investors as that is the scheme pled in the indictment.

THE COURT: I'm sure the Government will have no objection to say intent to defraud investors.

MR. MCGOVERN: Perfectly fine.

MR. SINCLAIR: No objection.

THE COURT: I can't imagine the jury is still thinking of anybody else in this case but go ahead.

MS. KEELEY: We had some testimony as well, Your Honor.

THE COURT: Okay.

MS. KEELEY: There is language in the second element, I'm sorry. Yes, the second element, I believe, concerning, nor is it a defense to the crime of securities fraud that an investor did not exercise care in evaluating the brokers' advice or recommendation.

THE COURT: What part of the charge are you concerned about now?

MS. KEELEY: I'm looking for a Page, Your Honor. I believe it's Page 16, yes, at lines 14 to 15.

THE COURT: Yes. Okay. So, you're talking about specifically for the court reporter's edification this language, "Nor is it a defense to the crime of securities fraud that an investor did not exercise care in evaluating a broker's advice or recommendation."

What's your problem with that?

MS. KEELEY: We just think it's confusing given neither of the defendants is a broker or alleged to have been a broke. And we're not sure what this language is exactly going.

THE COURT: That doesn't seal to be relevant here.

MR. SINCLAIR: We can use the words "portfolio manager."

MS. KEELEY: This is not a case about a portfolio manager making an advice or recommendation.

THE COURT: I think that it won't harm the charge

if I just eliminated that. I think that's designed for a different purpose. I will eliminate that.

Go ahead. Anything else?

MS. KEELEY: With respect to Count One of the conspiracy, there seems to be a little bits of an inconsistent in this charge sometimes it mentions wire fraud as being an object.

THE COURT: We're going to make sure that the object is the securities fraud, but bear in mind, as I told you yesterday, that I didn't edit this thing.

MS. KEELEY: I understand.

THE COURT: I am somewhat otherwise engaged.

MS. KEELEY: I understand, Your Honor.

THE COURT: The object of the conspiracy, the securities fraud.

MR. SINCLAIR: It's the securities fraud and the wire fraud, Your Honor. That's how it's charged in the indictment.

THE COURT: We'll focus in on securities fraud that sounds more.

MR. MCGOVERN: Wire fraud is the subparts of the securities fraud.

THE COURT: I'm going to say securities fraud and you can absorb wire frauds in the context of that, but I don't want to give a separate charge as to the object of

that. I'm just not comfortable in doing that.

MR. MCGOVERN: As far as the language of the charge goes, we think it's fine for those purposes. If there is a jury question. Perhaps the concern is that if there is a question about whether or not they can consider the conspiracy with respect to the wire frauds because.

THE COURT: I'm leaving wire frauds out. If it's in here, it's an object of the conspiracy. I'm just going to say it's a conspiracy charge is what the object is and you said wire fraud correctly is a subset of it and I just don't wasn't to call undue attention to the jury which is going to come in a with a conspiracy. It should come conspiracy to commit securities fraud that's my take of it.

MR. MCGOVERN: Okay. It's just that it's for the purposes of how we charge it. I am just a little concerned that it's -- I don't want the Court charge inconsistent with the language of the indictment. That's the concern. I don't know.

THE COURT: I think it could be of very little practical view. Also, when it comes to sentencing, it's going to wash out. So let me just focus the issue. We're talking about when we talk about conspiracy, we talk about the object the being the security frauds.

MR. MCGOVERN: Possibly wire frauds is a subset of that. I want to be careful is all I'm saying.

THE COURT: Separate from the conspiracy to commit wire fraud here. What's wire fraud again and you're dealing with an e-mail here a telephone call there. I think it just has potential for confusion and this type of case we should try to avoid that.

MR. MCGOVERN: I agree with the Court. The only concern I have is, for instance, there is something in this record in this case that one of the wires that's currently going to the jury is that Mr. Tannin wrote an e-mail saying that, Ralph and I have 40 percent of our non-real estate net worth in these funds.

THE COURT: That can be part of a securities fraud argument.

MR. MCGOVERN: Let's say the jury says that securities fraud argument is garbage, but this wire is a really big problem because there's a stipulation in the record that Mr. Cioffi's net worth was like a hundred million dollars for example so the jury could find them guilty of conspiring to commit that wire fraud.

THE COURT: I think theoretically possible.

MR. MCGOVERN: That's one of the permutations we're dealing with.

THE COURT: It's one of the objections.

MS. KEELEY: Our objection was to make sure particularly the multiple objectives portion that if wire

fraud is considered one of the objects.

THE COURT: They have to be unanimous as to which one they're going to be dealing with.

MS. KEELEY: Correct, Your Honor.

MR. MCGOVERN: That's fine.

THE COURT: That there is unanimity in there, I will make sure.

Anything else?

MS. KEELEY: In addition, Your Honor, with respect to that and this may be simply na oversight on the part that I was up very late last night. I did not see any language concerning the fact that the overt acts have to be committed during the existence of the alleged conspiracy.

THE COURT: I don't think we put the overt act charge in here yet. Did it finally make its way into the revised copy? I don't think so. So we'll get the overt acts done.

MS. KEELEY: Thank you.

THE COURT: It does have to relate to the object the conspiracy.

MS. KEELEY: We have some language in our proposed instructions on that.

THE COURT: We have in here on Page 26 what is necessary that the overt act furthers or carries or promotes the conspiratorial scheme.

MS. KEELEY: As I said, I may have overlooked that last night.

THE COURT: Don't worry.

MS. KEELEY: Yes, Your Honor it is in there. Thank you.

In addition, we would request that the language that we proposed concerning the existence of an agreement be included which states, "Nor does the Government meet its burden of proof by showing that people simply met together from time to time and talked about common interests or engaged in similar conduct."

THE COURT: It's not there n there.

MS. KEELEY: I did not see that, Your Honor.

THE COURT: You know what happens with the conspiracy charge is I try to accommodate everybody which is my personality. I think become agree with that. So the conspiracy charge keeps growing, growing, growing, and growing and then periodically I look at it and cut it back.

MS. KEELEY: As I said, Your Honor, I read this very late last night.

THE COURT: Would you don't worry about it.

MS. KEELEY: We would rest on Rule 29 with regard to insider trading I think objections on that enough today unless you want to hear all of it.

THE COURT: You got yourself protected an that.

MS. KEELEY: I believe Mr. Tannin might have one.

THE COURT: Yes. Go ahead.

MS. EDELSTEIN: We just have a few comments, Your Honor.

On Page 18 of the charge, lines 9 through 12, which start with, "On the other hand an honest belief that everything would work out that no one would lose any money." We would request that the Court remove that from the charge we don't believe the facts in this case warrant an instruction here.

THE COURT: It doesn't seem to be relevant to this case here.

MS. EDELSTEIN: I don't believe any party actually requested that.

THE COURT: I can eliminate that. It doesn't seem to be apt here.

What else?

MS. EDELSTEIN: I believe Ms. Keeley is speaking about the conscious avoidance instruction. I believe actually part of it actually starts on Page 18, lines 20 through 22.

THE COURT: Starting with "Alternatively."

MS. EDELSTEIN: Right. I wanted to make sure that we got that out as well. Those were just our remainder of the comments on the draft charge. We would just ask that the

Court incorporate our Instruction No. 3 which is an instruction on the statement of present intent.

Given the prominence here about statements of Mr. Tannin we think it's important --

THE COURT: I haven't looked at that yet because I was up late at night also but I wasn't working on the case.

MS. EDELSTEIN: I misspoke. Proposed Jury Instruction No. 5.

THE COURT: You want this charge here? I don't know what it is.

Does the Government have any problem with it if we can accommodate the defendants.

MR. SINCLAIR: Unfortunately, we got logged back and we would like to return to one of the previous issues but I will look at this one now if it's helpful.

MS. EDELSTEIN: Our Proposed Instruction No. 5 which is a statement of present intent.

THE COURT: You want this statement whether a statement was untrue must be determined at the time that I was made.

MS. EDELSTEIN: Yes.

THE COURT: I guess that's okay.

MS. EDELSTEIN: And we elaborate on that as well.

THE COURT: I don't know whether I'm going to elaborate on that.

Go ahead. We'll just give you that.

MR. SINCLAIR: I that actually that's go in tandem if we can return to Page 18 of the draft charge. The Line 9 on the, "On the other hand."

THE COURT: Right.

MR. SINCLAIR: We asked ask that be kept in the previous honest belief in the truth of the representation made by the defendant is a good defense, however, inaccurate the statements may have --

THE COURT: I think you're right. There is a fair basis for me to keep it in the way it is so we'll do that.

MR. SINCLAIR: Thank you.

THE COURT: I will add the language about the statement that was untrue and means comment that was made.

MS. EDELSTEIN: We would just preserve or objection on language on Page 189 through 12 we don't think.

THE COURT: Balances the language now that I look at it.

Anything else?

MS. EDELSTEIN: We would ask that the Court look at our additional language in Instruction No. 5 as well. Just to elaborate, what it means for a statement to be untrue it must be determined at the time --

THE COURT: You can argue to the jury. I generally don't focus the jury's attention on specific facts of the

case. I leave it to counsel to argue.

Do you want to have a theory of defense included in the charge? That's something that you would be entitled to if you want to. You can have proposed anything.

MS. KEELEY: Your Honor, we perhaps will have one tomorrow proposed along with.

THE COURT: I don't want to to be ten pages long.

MS. KEELEY: No, Your Honor, it will not. But in addition along with the other instructions that you will find proposed today.

THE COURT: Anything else today? I think fortunately things have broken in a nice way that we can spend the time talking the way we are.

MS. EDELSTEIN: I have two additional comments we would also like our -- if the Court would consider or proposed jury instruction No. 9 about statements and sales talk and puffery.

THE COURT: Excuse me?

MS. EDELSTEIN: Puffery and sales talk. That they aren't, as a matter of law, material statements.

MR. MCGOVERN: We object to that.

THE COURT: Do you have a problem with that. That's true.

MR. MCGOVERN: It's really has no place in this case. I mean, there is no sales talk in this case. We have

statements of material we'll argue that the statements of fact about things that he's actually saying he's doing that have independent significant.

THE COURT: Statements of fact, period, is what this is all about and we'll make the jury know that statements of facts.

So, I may say that puffery is not a statement of fact as an example if you know if you want me to put something like that I may add that what else.

MS. KEELEY: We would direct the Court's intention to our proposed instruction No. 19 on that same issue.

THE COURT: Okay. I may put something in there to give the jury a cautionary tale that we're not talking about boasting or puffery or things of that nature. Actual statements of fact material statements of fact.

What else.

MS. EDELSTEIN: One additional point on the instruction with the knowing, willful, and specific intention to defraud in our proposed instruction No. 10. We had also requested that the Court considered instructing the jury as follows in considering whether each defendant had a specific intent to defraud I instruct you that a claimed desire to increase or maintain personal compensation or preserves one's representation is insufficient as a matter of law to establish an intent to defraud.

THE COURT: I'm not going to get involved in that.

Okay. What else?

MS. KEELEY: Your Honor, just two last items one.

THE COURT: Two last items.

MS. KEELEY: Yes.

THE COURT: You had the luxury of having elaborate pretrial conference but you know it's a quarter after 4:00 and I don't want my clerks to stay up later than 3 o'clock this morning.

MS. KEELEY: On lines 15 through 19, this is part of the securities fraud charge.

THE COURT: Didn't we go through securities fraud charge?

MS. KEELEY: I missed my margin note.

THE COURT: Last time.

MS. KEELEY: Lines 15 through 19 talks about the fact that defendants it doesn't matter whether the alleged unlawful conduct was or would have been successful or whether the defendants profited or would have profited as a result of alleged scheme success is not an element of the crime charge.

THE COURT: That's all true.

MS. KEELEY: Our view is that undercuts the requirement that the alleged fraud has to be in connection with the purchase or sale of security as well as undercuts the fact that the Government has a burden of proof on motive.

They have to show intent.

THE COURT: You say that it has to show intent.

MR. SINCLAIR: Two different things.

The Government never has the burden of proof on motive.

THE COURT: That's right.

MR. MCGOVERN: But we do have a burden of proof on intent.

THE COURT: Okay.

MR. MCGOVERN: And as you'll see tonight, Your Honor, when we file what the current state of the law is in connection with the security and the Circuit it's really going to be touch upon the purchase or sale of a security.

And this language is the standard language because of that. That it doesn't really make a difference whether the alleged conduct would have been successful or unsuccessful.

THE COURT: That's true.

MR. BUTSWINKAS: We state our objection and for purposes of preservation of record, we also reiterate our request for proposed jury instructions 2, 3, 4, and 12 of our proposed jury instructions filed on October 30th.

THE COURT: You discussed those already.

MS. KEELEY: We discussed those topics. I wanted to make clear that those are the instructions that we would

be --

THE COURT: 2, 3, 5, and 12 I will take.

MS. KEELEY: 2, 3, 4 and 12, Your Honor.

THE COURT: 2, 3, 4 and 12. We'll take another look.

MS. KEELEY: Finally, Your Honor, I would ask whether you want us to file written objections to the current stage of the charge.

THE COURT: I think you were given every opportunity now to state on the record what the objections are. We have enough writings as it is.

MS. KEELEY: We will preserve them and write them at the time the jury is charged.

THE COURT: If you want to submit anything to me that is apropos that was discussed today, let's not repeat everything here and put down everything in writing that is not necessary.

You have a couple of focused matters. We have to look at whatever it is that you sent to me. I think we have really done a good job collectively in terms of giving you folks a very good sense of how to prepare for your summations.

Mr. Sinclair, do you agree with that.

MR. SINCLAIR: I do. We have two line edits that we would propose these are our only proposals.

THE COURT: You don't have to be bashful.

MR. SINCLAIR: On Page 20. Use of interstate commerce or mails or facility. We would ask that e-mails be injected in the list along with telephone, fax machine.

THE COURT: What language.

MR. SINCLAIR: Line two of Page 20.

MS. KEELEY: We have no objection to that, Your Honor.

THE COURT: E-mails make it referable to this case. Go ahead.

MR. SINCLAIR: And then our final line edit is on Page 29, the first element of insider trading at Line 10.

THE COURT: Yes.

MR. SINCLAIR: Corporate officers, directors, and controlling shareholders. And portfolio managers are considered insiders. And the basis for that Your Honor is the defendant's motions.

THE COURT: One second. I will put, "And portfolio managers," okay?

What else.

MR. SINCLAIR: That's all, Your Honor.

MS. KEELEY: Your Honor, we would object to that.

MR. SINCLAIR: Your Honor, I have the defendants' motion they filed this summer.

THE COURT: You object to what.

MR. SINCLAIR: Being that the jury instructed as a matter of law that a portfolio manager is an insider.

Your Honor, I have the defendants' motions from this summer where they both say in both of these motions to dismiss Count Four that of course Mr. Cioffi was an insider because he was a portfolio manager.

THE COURT: I think portfolio managers in the context of this case are considered insiders how else would you true Mr. Cioffi.

Anything else.

MS. EDELSTEIN: To make the record clearer, Mr. Tannin joins in the objections made by Mr. Cioffi as well as the requests to incorporate into the charge and we also just again request that the Court give the following instructions which we've discussed earlier which was proposed jury instruction Nos. 5, 9, 7, and 11.

THE COURT: You said that are they I did different than what you.

MS. EDELSTEIN: Statement of present intent. The statements of puffery, materiality charge, and in connection with the purchase or sale.

THE COURT: Okay. Well, these are all of these things we discussed here, right?

MS. EDELSTEIN: Yes.

THE COURT: So, you want to be careful that you are

preserving the record.

Anything else?

MS. KEELEY: Just, Your Honor, requests with regard to timing just so we can advise other colleagues with respect to closing when the next draft of the jury instructions may come out.

THE COURT: What I propose to do, okay, since Congress yesterday passed a statute authorizing time and a half pay for judges after 5 o'clock. I plan to work long and hard on this tonight. Somehow I'm not going get paid $1,200 an hour. If I had choices I would have gone to Wall Street.

So I'm going to try my best to get this out to you sometime tomorrow morning and send it over to your offices and then you'll have an opportunity again to talk to me about anything else you want before I start the summations on Thursday and I will charge Monday to get it done right but we'll get this do you hopefully by tomorrow morning some time late morning or something like that.

MR. SINCLAIR: I'm loathe to ask this but do you want us back here tomorrow?

THE COURT: What do you think? Do you think it's necessary to come back tomorrow afternoon to go over the charge.

MS. KEELEY: I think it might make sense to at least reserve time and we can always cancel.

THE COURT: If you want to do it.

MR. SINCLAIR: We're not moving for it we're just asking.

THE COURT: Why don't we do this. Send it to me when we get this tomorrow. If there are any real problems, you just jot it down in an e-mail, I guess, right, without having to burden you to possibly come back for no real significant reason to reargue these issues if there's anything in particular when I get the charge give me heads up tomorrow afternoon and then I can give you the final word Thursday morning.

MS. KEELEY: I take it that's just comments we may have on the changes the Court is incorporating tonight and not to rehash hashing everything we went through.

THE COURT: There is an open item that we still have.

MR. SINCLAIR: *Abrahamson*. We will get it to you later this evening.

MS. KEELEY: We will as well.

THE COURT: And then we have until Monday to get the charge and the important thing is we have enough information to get your missions and you think we've accomplished that already.

So, if you want to write back to me by tomorrow afternoon feel free to do. It's Thursday morning, I

am not going to give time limits as such but we're going to finish summations about Friday afternoon by the end of the day.

What I want to guard against, and be mindful of this, all of you, is to have the rebuttal come in just Monday morning. I think that that doesn't sound right to me, so if I have to keep the jurors late I'll do so. I may keep them late on Thursday, we'll see how things go but I am examining from what Ms. Jaroslaw said. We will be finished with the Government's argument hopefully lunch time.

MR. MCGOVERN: That sounds about reasonable that we would be able to do our summation in the morning and, you know, within striking distance of the morning.

THE COURT: So I think that, you know, my guess is that we should finish with the Government's summation and with the Mr. Butswinkas's summations hopefully first.

It will be something to gun for and that will leave Ms. Brune Friday morning and then the Government's rear buttal that should give us ample time it's going to require my really monitoring this carefully to avoid the possibility that the Government would get the last word in on Monday morning before we they get the charge we seriously avoid that.

MR. MCGOVERN: That sounds fair.

THE COURT: All right.

MR. MCGOVERN: What I am concerned about is the possibility of defense summations, not necessarily by design, running very late.

THE COURT: They know. I mean, if we get a reasonable period of time that the Government uses on Thursday, then we get Mr. Butswinkas and, you know, Brune goes on and on and on I don't like to cut people off and finish with their summation 5 o'clock Friday and it may well be that they have to run the risk of having the Government's rebuttal on Monday but they're aware of that.

MS. KEELEY: We're aware of that.

MR. MCGOVERN: That's a fair statement, Your Honor.

THE COURT: All right.

(WHEREUPON, the proceedings were adjourned to November 5, 2009, at 10:00 a.m.)

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INDEX

WITNESS:	**PAGE**:
R O B E R T G L E N N H U B B A R D	2555
DIRECT EXAMINATION	2556
BY MS. BRUNE:	
CROSS EXAMINATION	2569
BY MR. McGOVERN:	
REDIRECT EXAMINATION	2620
BY MS. BRUNE	
RECROSS-EXAMINATION	2629
BY MR. McGOVERN	

*****

EXHIBITS **PAGE**:

Government's Exhibit 659 was received in evidence as of this date 2665

Defendant's Exhibit 2659 was marked in evidence as of this date. 2658

Defendant's Exhibit 2661 was marked in evidence as 2658

of this date.

Defendant's Exhibit 617 was marked in evidence as of this date 2661

Defendant's Exhibit 1960 was marked in evidence as of this date 2662

Defendant's Exhibits 2659 and 2661 were marked in evidence as of this date 2663

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$

$1,200 [5] - 2569:3, 2569:25, 2571:22, 2571:24, 2738:10
$100,000 [2] - 2570:4, 2573:25
$200,000 [1] - 2574:3
$25 [1] - 2694:23
$300,000 [1] - 2605:1
$50,000 [1] - 2573:4

'

'91 [1] - 2575:9
'93 [1] - 2575:10

0

06-1 [1] - 2625:18
08-CR-415 [1] - 2554:8
08-CR-415(FB [1] - 2552:3

1

1 [2] - 2660:17, 2675:3
10 [6] - 2666:15, 2672:14, 2713:7, 2713:10, 2732:19, 2736:12
100 [1] - 2633:12
100,000 [1] - 2574:3
10004 [1] - 2553:4
10:00 [2] - 2552:8, 2741:15
10B [4] - 2677:13, 2677:15, 2679:8, 2690:6
10B-5 [5] - 2677:13, 2677:15, 2679:8, 2679:18, 2681:13
11 [1] - 2737:16
11201 [1] - 2552:15
12 [9] - 2672:8, 2672:9, 2713:21, 2728:5, 2730:16, 2734:21, 2735:2, 2735:3, 2735:4
12:00 [1] - 2620:3
12:21 [1] - 2620:5
12:51 [1] - 2620:13
13 [1] - 2715:24
14 [2] - 2715:24, 2722:9
15 [4] - 2718:3, 2722:9, 2733:10, 2733:16
16 [2] - 2721:11, 2722:9
160 [1] - 2601:20
17 [1] - 2721:11
18 [3] - 2728:5, 2728:20, 2730:3
1828 [10] - 2639:1, 2639:3, 2639:6, 2639:17, 2645:15, 2645:24, 2646:1, 2646:5, 2646:6, 2646:10
1848 [4] - 2640:22, 2641:10, 2641:12, 2642:5
1849 [3] - 2640:22, 2641:10, 2642:5
189 [1] - 2730:16
19 [6] - 2596:15, 2713:3, 2713:8, 2732:11, 2733:10, 2733:16
1930s [1] - 2587:13
1940 [2] - 2577:9, 2577:10
1960 [8] - 2639:24, 2640:6, 2640:18, 2640:20, 2661:25, 2662:1, 2662:7, 2743:4
1968 [1] - 2677:21
1979 [2] - 2557:2, 2681:5
1991 [1] - 2557:16
1993 [1] - 2557:16
1:11 [1] - 2637:8
1:27 [1] - 2650:25

2

2 [15] - 2637:11, 2637:19, 2639:4, 2640:11, 2647:5, 2647:22, 2647:24, 2648:6, 2650:24, 2713:7, 2713:10, 2734:21, 2735:2, 2735:3, 2735:4
20 [3] - 2728:20, 2736:2, 2736:6
20/20 [1] - 2632:23
20005 [1] - 2552:21
2001 [2] - 2557:17, 2576:5
2003 [1] - 2557:17
2007 [44] - 2563:15, 2566:13, 2579:10, 2579:15, 2580:15, 2582:20, 2583:11, 2584:14, 2590:2, 2590:18, 2591:18, 2593:1, 2597:20, 2598:19, 2600:9, 2600:16, 2600:17, 2600:18, 2600:22, 2601:15, 2608:23, 2609:9, 2610:5, 2610:17, 2610:22, 2616:11, 2618:8, 2621:17, 2622:16, 2623:18, 2624:7, 2625:5, 2627:8, 2628:11, 2629:8, 2629:21, 2630:21, 2632:9, 2632:14, 2664:11, 2664:13, 2664:18, 2664:23
2008 [1] - 2600:20
2009 [3] - 2552:7, 2664:24, 2741:15
22 [1] - 2728:21
22nd [1] - 2629:8
25 [1] - 2620:2
2555 [1] - 2742:6
2556 [1] - 2742:7
2569 [1] - 2742:9
25th [1] - 2720:21
26 [1] - 2726:23
2620 [1] - 2742:11
2629 [1] - 2742:13
2658 [2] - 2742:23, 2742:25
2659 [13] - 2642:12, 2642:24, 2643:13, 2644:14, 2658:6, 2658:8, 2658:20, 2658:22, 2662:25, 2663:1, 2663:7, 2742:23, 2743:6
2661 [12] - 2642:10, 2642:20, 2642:22, 2642:25, 2643:12, 2658:22, 2662:23, 2662:24, 2663:7, 2742:25, 2743:2, 2743:6
2662 [1] - 2743:4
2663 [1] - 2743:6
2665 [1] - 2742:19
27 [1] - 2588:11
271 [1] - 2552:15
29 [3] - 2704:8, 2704:10, 2736:12
2:00 [3] - 2635:14, 2635:19, 2652:2
2:13 [1] - 2660:13
2:28 [1] - 2672:16
2:45 [1] - 2674:13
2:59 [1] - 2674:20

3

3 [9] - 2552:7, 2664:24, 2683:5, 2729:1, 2733:8, 2734:21, 2735:2, 2735:3, 2735:4
30th [2] - 2720:23, 2734:22
39 [1] - 2592:3
393 [1] - 2681:18

4

4 [5] - 2629:13, 2629:16, 2734:21, 2735:3, 2735:4
40 [5] - 2560:4, 2577:11, 2592:3, 2705:9, 2725:10
441 [1] - 2681:5
45 [1] - 2667:19
467 [1] - 2681:18
4:00 [2] - 2555:16, 2733:7

5

5 [9] - 2694:22, 2729:8, 2729:16, 2730:21, 2735:2, 2737:16, 2738:9, 2741:8, 2741:15
50 [1] - 2623:5
50,000 [1] - 2574:3
568 [1] - 2676:4
586 [1] - 2665:2

6

613-2487 [1] - 2553:12
613-2694 [1] - 2553:12
617 [6] - 2645:8, 2661:4, 2661:9, 2661:11, 2661:22, 2743:2
659 [2] - 2665:6, 2742:19
69 [1] - 2713:9

7

7 [5] - 2593:1, 2694:12, 2694:20, 2704:9, 2737:16
71 [1] - 2685:7
718 [2] - 2553:12, 2553:12
725 [1] - 2552:20
768 [1] - 2681:5

8

80 [1] - 2553:4
801 [1] - 2641:4
862 [1] - 2676:5

9

9 [4] - 2728:5, 2730:3, 2731:16, 2737:16
9/11 [1] - 2576:10
90 [1] - 2621:3
95-page [1] - 2680:19
99.9 [1] - 2659:18

9th [1] - 2629:11

A

a.m [2] - 2552:8, 2741:15
aberration [1] - 2624:25
aberrational [1] - 2584:8
abetted [1] - 2700:23
abetting [13] - 2698:15, 2698:20, 2698:21, 2698:24, 2699:2, 2699:4, 2699:8, 2699:15, 2699:23, 2700:10, 2700:15, 2700:18, 2700:21
ability [1] - 2622:1
able [10] - 2562:21, 2566:1, 2603:17, 2646:25, 2648:11, 2667:24, 2670:20, 2695:13, 2707:19, 2740:12
Abrahamson [19] - 2676:4, 2676:5, 2676:9, 2676:19, 2677:7, 2677:9, 2677:20, 2678:9, 2678:18, 2679:4, 2681:1, 2681:10, 2681:20, 2683:25, 2684:14, 2685:11, 2690:7, 2690:17, 2739:17
ABS [4] - 2620:23, 2620:25, 2625:13, 2631:22
absence [1] - 2706:9
absolute [2] - 2603:9, 2683:1
absolutely [5] - 2601:11, 2604:8, 2679:13, 2685:5, 2707:4
absorb [1] - 2723:24
absorbed [3] - 2568:4, 2568:5, 2691:7
abstain [1] - 2707:15
abundant [1] - 2628:23
ABX [13] - 2565:23, 2584:25, 2585:9, 2585:11, 2585:12, 2588:1, 2588:3, 2597:16, 2611:18, 2617:4, 2625:1, 2625:22
academic [3] - 2559:24, 2560:14, 2649:7
accept [4] - 2572:5, 2599:8, 2631:1, 2675:5
accepted [2] - 2560:23, 2609:20
access [3] - 2631:3, 2631:5, 2631:6
accommodate [2] - 2727:15, 2729:12
accomplish [2] - 2667:24, 2716:25
accomplished [1] - 2739:23
according [2] - 2581:12, 2671:5
accordingly [2] - 2695:15, 2695:25
accounted [1] - 2554:25
accounting [1] - 2558:1
accounts [1] - 2664:21
accredited [5] - 2605:3, 2605:8, 2605:13, 2605:17, 2606:5
accuracy [2] - 2578:13, 2610:1
accurate [1] - 2609:21
accurately [1] - 2618:25
achieve [1] - 2563:1
acknowledge [1] - 2697:20
acquire [2] - 2622:1, 2626:6
acquiring [1] - 2628:24
act [5] - 2713:21, 2716:11, 2716:23, 2726:14, 2726:24
Act [5] - 2560:5, 2577:9, 2577:10, 2577:11, 2577:12
acted [1] - 2567:11
action [1] - 2681:12
activities [1] - 2567:15
activity [3] - 2558:19, 2683:8, 2715:4
acts [2] - 2726:12, 2726:16
actual [20] - 2559:22, 2571:16, 2605:16, 2611:17, 2620:20, 2632:22, 2647:5, 2679:22, 2680:5, 2680:16, 2684:12, 2684:23, 2684:25, 2685:1, 2685:2, 2685:12, 2688:8, 2691:7, 2718:14, 2732:14
ad [1] - 2670:11
add [3] - 2688:5, 2730:13, 2732:9
added [4] - 2573:1, 2614:3, 2631:15, 2720:1
addition [8] - 2631:12, 2631:14, 2695:19, 2712:24, 2713:17, 2726:9, 2727:6, 2731:9
additional [11] - 2563:19, 2622:15, 2623:3, 2637:20, 2643:22, 2656:17, 2662:17, 2689:4, 2730:21, 2731:14, 2732:17
address [7] - 2591:3, 2663:24, 2677:7, 2679:2, 2681:25, 2686:3, 2721:5
addressed [3] - 2663:20, 2675:19, 2716:1
addresses [1] - 2657:5
adjourned [1] - 2741:14
administration [2] - 2575:9, 2575:24
admissible [1] - 2643:15
admitted [1] - 2639:5
adopt [1] - 2578:4
advance [2] - 2574:22, 2574:25
advantage [4] - 2627:24, 2628:21, 2703:20, 2707:19
adverse [1] - 2586:7
advice [6] - 2660:20, 2698:3, 2698:4, 2722:5, 2722:14, 2722:24
advise [3] - 2557:22, 2557:24, 2738:4
advising [1] - 2679:2
advisor [1] - 2557:23
Advisors [3] - 2557:18, 2557:21, 2577:12
advisors [2] - 2557:20, 2575:22
affairs [2] - 2608:22, 2608:25
affect [5] - 2558:7, 2558:16, 2578:13, 2585:19, 2593:14
affects [4] - 2558:6, 2558:15, 2558:19, 2576:6
affirmed [1] - 2720:12
affirming [1] - 2655:22
afield [2] - 2589:8, 2599:9
afternoon [9] - 2635:16, 2648:9, 2652:1, 2666:1, 2668:1, 2738:22, 2739:10, 2739:25, 2740:2
agencies [1] - 2588:25
Agent [1] - 2554:15
ago [1] - 2630:8
agree [35] - 2581:15, 2581:16, 2591:15, 2592:25, 2595:2, 2595:22, 2595:23, 2595:25, 2596:5, 2597:21, 2598:1, 2599:21, 2600:7, 2601:2, 2603:22, 2604:1, 2604:22, 2616:4, 2616:11, 2632:25, 2641:12, 2649:22, 2654:13, 2659:18, 2660:6, 2680:1, 2686:16, 2689:18, 2706:25, 2709:21, 2710:18, 2712:2, 2725:6, 2727:16, 2735:23
agreed [4] - 2661:2, 2664:7, 2696:6, 2717:24
agreeing [1] - 2696:14
agreement [9] - 2567:9, 2585:23, 2586:8, 2598:9, 2598:15, 2598:22, 2639:12, 2688:15, 2727:8
agreements [2] - 2565:7, 2598:6
agrees [2] - 2686:14, 2686:17
ahead [17] - 2596:4, 2609:14, 2609:25, 2610:12, 2614:19, 2619:6, 2620:15, 2661:24, 2662:22, 2673:14, 2709:13, 2709:18, 2721:22, 2723:3, 2728:2, 2730:1, 2736:10
aid [1] - 2700:18
aided [2] - 2553:14, 2700:23
aiding [13] - 2698:15, 2698:20, 2698:21, 2698:24, 2699:2, 2699:4, 2699:8, 2699:15, 2699:23, 2700:10, 2700:15, 2700:18, 2700:21
albeit [1] - 2677:12
alive [1] - 2610:4
allegation [3] - 2676:7, 2678:2, 2687:4
allegations [2] - 2687:11, 2688:25
alleged [14] - 2688:20, 2710:1, 2710:10, 2710:19, 2710:25, 2712:14, 2715:3, 2716:21, 2722:17, 2726:13, 2733:17, 2733:20, 2733:23, 2734:16
alleging [1] - 2687:16
allow [15] - 2568:14, 2609:16, 2621:24, 2642:5, 2643:2, 2643:8, 2645:8, 2647:2, 2654:19, 2655:8, 2658:19, 2661:2, 2663:21, 2668:15, 2719:18
allowed [6] - 2654:7, 2654:10, 2654:25, 2660:25, 2662:18, 2675:11
allowing [1] - 2648:2
alone [1] - 2587:8
Alternate [1] - 2660:17
alternate [1] - 2660:19
Alternatively [1] - 2728:22
altogether [1] - 2672:10
AMERICA [1] - 2552:3
America [2] - 2554:8, 2554:12
American [3] - 2558:20, 2572:14, 2711:20
amount [5] - 2577:4, 2591:4, 2591:13, 2591:17, 2693:19
amounts [1] - 2566:22
ample [3] - 2609:17, 2650:6, 2740:19
analysis [29] - 2559:12, 2561:6, 2561:9, 2566:14, 2566:16, 2568:24, 2569:8, 2570:6, 2570:13, 2571:25, 2572:2, 2572:18, 2572:24, 2573:17, 2574:2, 2578:10, 2581:7, 2584:8, 2586:17, 2601:18, 2608:24, 2610:7, 2610:20, 2622:2, 2623:22, 2630:5, 2631:8, 2631:11
analyze [2] - 2567:8, 2632:6
analyzed [1] - 2562:8
analyzing [1] - 2563:3
AND [1] - 2552:7
announce [1] - 2593:2
announcing [1] - 2595:20
annual [1] - 2566:7

answer [19] - 2561:18, 2562:21, 2562:24, 2563:24, 2579:21, 2588:21, 2588:22, 2596:8, 2596:9, 2597:25, 2615:9, 2615:16, 2631:10, 2633:7, 2652:10, 2677:24, 2684:4
answered [4] - 2571:5, 2571:19, 2582:3, 2605:24
answering [3] - 2580:3, 2596:2, 2607:18
answers [2] - 2596:1, 2616:17
ante [4] - 2581:2, 2632:21, 2632:25
Anthony [1] - 2553:11
anthony_Frisolone@nyed.uscourts.gov [1] - 2553:13
anticipate [1] - 2667:2
anticipating [1] - 2586:15
anticipation [1] - 2638:9
anyway [1] - 2604:12
apart [1] - 2716:7
apologize [3] - 2606:1, 2645:21, 2691:22
Appeals [1] - 2681:24
appear [1] - 2577:4
appearance [2] - 2574:14, 2595:4
Appearances [1] - 2553:1
appearances [1] - 2554:10
appeared [1] - 2624:25
appellate [1] - 2679:2
Apple [3] - 2711:21, 2711:22, 2711:23
application [3] - 2641:25, 2653:2, 2686:11
applies [1] - 2661:11
apply [5] - 2643:8, 2655:11, 2656:21, 2669:9, 2679:5
appreciate [3] - 2597:2, 2645:7, 2686:4
appreciates [1] - 2589:15
approach [3] - 2576:16, 2634:9, 2645:21
appropriate [2] - 2573:19, 2686:15
appropriately [2] - 2591:12, 2663:20
April [15] - 2563:15, 2566:3, 2567:8, 2579:15, 2585:2, 2585:17, 2588:8, 2601:20, 2603:19, 2624:14, 2625:1, 2626:22, 2628:5, 2630:4, 2720:21
apropos [1] - 2735:15
apt [1] - 2728:16
arbitrage [1] - 2631:24
archiving [1] - 2664:15
area [5] - 2559:14, 2559:19, 2560:3, 2560:8, 2697:23
areas [2] - 2559:9, 2559:10
arguably [2] - 2654:11, 2691:3
argue [20] - 2677:14, 2680:18, 2686:25, 2691:5, 2696:1, 2698:13, 2703:12, 2704:20, 2705:14, 2706:2, 2708:13, 2713:14, 2718:8, 2718:9, 2718:20, 2719:11, 2719:16, 2730:24, 2731:1, 2732:1
arguing [1] - 2684:10
argument [6] - 2677:25, 2679:12, 2705:17, 2725:13, 2725:15, 2740:10
argument's [1] - 2701:9
argumentative [1] - 2606:17
arguments [6] - 2665:10, 2665:13, 2665:16, 2665:17, 2666:9, 2695:5
arises [2] - 2703:19, 2704:3
arithmetic [2] - 2619:11, 2624:23
arrangement [2] - 2572:20, 2598:22
arrangements [3] - 2567:11, 2585:23, 2587:17
arriving [1] - 2621:6
art [1] - 2606:5
article [2] - 2560:15, 2576:16
articles [3] - 2560:12, 2560:14, 2573:11
articulate [1] - 2718:11
articulated [2] - 2565:15, 2606:10
artifice [1] - 2716:22
arts [2] - 2556:12, 2556:22
Arts [2] - 2557:1, 2557:4
ascertain [1] - 2631:3
ascertaining [1] - 2581:5
aside [2] - 2636:1, 2680:8
aspect [1] - 2706:6
assess [2] - 2561:25, 2609:1
assessing [1] - 2644:21
asset [5] - 2562:17, 2565:12, 2610:25, 2623:1, 2623:2
Asset [1] - 2664:17
assets [31] - 2582:1, 2584:17, 2584:18, 2584:19, 2586:10, 2586:12, 2594:24, 2594:25, 2595:21, 2598:20, 2598:24, 2599:4, 2599:6, 2599:7, 2599:14, 2612:5, 2613:13, 2613:15, 2613:25, 2621:12, 2621:25, 2622:1, 2622:14, 2623:24, 2626:16, 2626:22, 2626:24, 2628:6, 2628:24, 2693:21
assigned [1] - 2664:21
assimilate [1] - 2566:1
Assistant [2] - 2552:18, 2554:13
assistant [2] - 2557:16, 2569:19
assisted [1] - 2569:7
associate [1] - 2557:13
Associate [1] - 2664:9
associated [1] - 2623:8
assume [6] - 2580:22, 2583:5, 2623:2, 2623:3, 2623:5, 2650:17
assumed [3] - 2625:4, 2625:5, 2626:8
assuming [3] - 2609:21, 2624:23, 2697:17
assumptions [2] - 2558:15, 2616:12
assure [1] - 2581:25
attached [1] - 2645:18
attacks [1] - 2558:1
attempted [1] - 2587:20
attempting [1] - 2687:23
attend [1] - 2663:12
attention [11] - 2615:18, 2641:24, 2650:18, 2666:8, 2670:19, 2674:23, 2681:1, 2690:11, 2711:5, 2724:11, 2730:25
attorney [6] - 2569:20, 2590:20, 2591:24, 2605:17, 2605:20, 2667:13
Attorney [1] - 2552:14
attorneys [2] - 2553:3, 2608:22
Attorneys [3] - 2552:18, 2552:19, 2554:13
attribution [3] - 2572:3, 2572:25, 2573:1
August [2] - 2632:8, 2632:13
Austin [2] - 2698:10, 2698:12
authenticity [1] - 2639:13
author [2] - 2571:3, 2571:18
authored [2] - 2577:1, 2698:10
authority [2] - 2690:8, 2703:24
authorizing [1] - 2738:8
available [20] - 2580:21, 2590:3, 2611:6, 2611:8, 2611:9, 2611:11, 2611:15, 2611:20, 2612:11, 2616:18, 2616:20, 2623:17, 2625:6, 2626:13, 2626:17, 2626:18, 2628:18, 2630:25, 2631:3, 2650:11
average [1] - 2607:16
averse [1] - 2650:1
avoid [6] - 2647:1, 2647:6, 2647:7, 2725:5, 2740:20, 2740:22
avoidance [5] - 2712:25, 2713:1, 2713:5, 2713:13, 2728:19
aware [4] - 2636:3, 2638:3, 2741:10, 2741:11
awesome [1] - 2672:11

B

Bachelor [2] - 2557:1
backed [4] - 2565:9, 2565:12, 2587:16, 2621:11
background [1] - 2556:25
bad [5] - 2590:14, 2594:20, 2595:3, 2696:7, 2696:23
bait [1] - 2633:14
balance [1] - 2621:4
balances [1] - 2730:17
ballpark [1] - 2649:9
bang [1] - 2625:23
bank [8] - 2559:4, 2565:4, 2565:5, 2587:14, 2598:15, 2621:14, 2683:7
Bank [2] - 2559:6, 2675:1
Bank of America [5] - 2621:17, 2621:19, 2629:7, 2643:24, 2658:17
banks [4] - 2594:5, 2598:18, 2622:22
Barclay's [3] - 2621:16, 2628:18, 2628:23
base [1] - 2562:12
based [28] - 2563:3, 2566:14, 2572:3, 2573:5, 2573:20, 2605:18, 2606:4, 2606:24, 2608:20, 2611:2, 2623:22, 2625:6, 2629:22, 2664:15, 2664:17, 2683:21, 2684:6, 2688:16, 2688:24, 2691:19, 2693:20, 2695:9, 2705:21, 2709:21, 2714:3, 2719:19, 2719:23
baseline [1] - 2565:19
bashful [1] - 2736:1
basic [4] - 2568:3, 2612:1, 2612:2, 2702:7
basis [11] - 2563:14, 2564:12, 2568:3, 2568:7, 2578:10, 2581:19, 2607:18, 2610:5, 2643:8, 2730:11, 2736:16
Bated [1] - 2707:25
Bear [17] - 2587:19, 2645:1, 2646:21, 2646:22, 2646:23, 2647:1, 2647:4, 2652:24, 2653:9, 2664:8, 2664:11, 2664:14, 2664:17, 2664:20, 2664:21
bear [2] - 2673:9, 2723:9

bearish [1] - 2587:5
Beattie [3] - 2644:10, 2659:25, 2662:16
bEATTIE [1] - 2553:5
BEATTIE [33] - 2640:15, 2640:17, 2640:21, 2641:11, 2641:21, 2642:8, 2642:12, 2642:17, 2642:24, 2643:3, 2643:10, 2643:16, 2643:21, 2644:5, 2645:15, 2647:15, 2647:17, 2647:25, 2657:24, 2658:2, 2658:6, 2658:8, 2658:11, 2658:15, 2658:17, 2658:24, 2659:6, 2659:13, 2662:17, 2662:21, 2662:25, 2663:3, 2663:6
beauty [1] - 2672:8
became [2] - 2592:20, 2592:21
become [1] - 2727:16
becoming [1] - 2666:23
BEFORE [1] - 2552:11
began [1] - 2557:8
begin [3] - 2597:3, 2624:21, 2709:24
beginning [2] - 2633:21, 2715:20
begins [1] - 2713:22
behalf [1] - 2638:13
behavior [1] - 2567:2
behind [2] - 2655:20, 2699:11
belief [2] - 2728:6, 2730:7
bell [1] - 2672:6
below [3] - 2581:21, 2581:24, 2716:1
belt [1] - 2701:21
bench [1] - 2554:6
bend [1] - 2602:4
benefit [1] - 2702:17
benefits [1] - 2702:18
BENTON [1] - 2552:13
best [6] - 2584:9, 2595:22, 2596:25, 2628:16, 2668:16, 2738:12
bet [1] - 2625:21
bets [3] - 2615:17, 2631:2, 2631:4
better [5] - 2586:20, 2588:25, 2667:2, 2700:25, 2701:3
between [16] - 2559:22, 2579:6, 2587:6, 2596:21, 2597:4, 2646:15, 2659:4, 2659:5, 2663:14, 2679:20, 2679:25, 2682:19, 2682:22, 2684:12, 2685:17, 2704:3
beyond [2] - 2610:9, 2656:14
bias [2] - 2675:16, 2675:22
bibliography [1] - 2570:25
big [10] - 2557:25, 2560:8, 2592:20, 2592:21, 2592:25, 2622:22, 2644:21, 2694:9, 2715:7, 2725:16
bigger [1] - 2653:4
biggest [3] - 2601:19, 2602:21, 2606:25
bill [5] - 2572:1, 2572:17, 2572:23, 2573:18, 2574:6
billing [1] - 2572:21
billings [3] - 2572:3, 2572:8, 2573:21
billion [3] - 2596:15, 2629:13, 2629:16
billions [1] - 2604:6
bills [2] - 2573:17, 2573:22
bit [4] - 2596:19, 2607:16, 2627:23, 2654:1
bits [1] - 2723:5
black [3] - 2606:2, 2613:19, 2613:20
blessed [1] - 2698:11
BLOCK [1] - 2552:11
block [1] - 2659:18
Block [5] - 2554:5, 2554:6, 2577:21, 2592:2, 2682:1
blow [1] - 2633:5
blown [1] - 2619:8
Blue [3] - 2678:4, 2681:2, 2681:9
Board [1] - 2559:6
board [1] - 2638:4
boasting [1] - 2732:14
boilerplate [2] - 2708:19, 2714:24
bolstered [2] - 2566:16, 2567:14
bonds [2] - 2565:9, 2584:17
bonus [1] - 2646:9
book [3] - 2644:18, 2644:20, 2702:8
books [5] - 2560:16, 2560:17, 2560:19, 2577:1, 2620:19
boring [1] - 2656:7
borrow [1] - 2598:10
borrowed [1] - 2607:15
borrowing [2] - 2584:17, 2607:12
bought [8] - 2562:14, 2565:8, 2588:2, 2588:3, 2710:20, 2711:21, 2719:9
bound [2] - 2655:4, 2700:13
box [2] - 2613:19, 2613:20
branch [1] - 2677:24
break [5] - 2584:13, 2619:20, 2660:22, 2671:20
breakdown [1] - 2620:23
Brian [1] - 2554:14
bRIAN [1] - 2552:17
brief [1] - 2699:22
briefly [2] - 2634:10, 2667:7
bright [1] - 2617:17
brilliant [1] - 2586:16
bring [7] - 2555:2, 2555:9, 2620:9, 2644:8, 2656:23, 2657:21, 2710:12
broad [2] - 2561:9, 2617:3
Broad [1] - 2553:4
broadest [1] - 2561:11
broke [3] - 2582:22, 2582:24, 2722:18
broken [2] - 2671:25, 2731:12
broker [1] - 2722:17
broker's [1] - 2722:14
brokers' [1] - 2722:5
Brooklyn [2] - 2552:5, 2552:15
brought [4] - 2653:3, 2654:9, 2670:19, 2670:24
Brown's [1] - 2602:20
Brune [15] - 2554:20, 2568:9, 2568:11, 2580:6, 2619:23, 2620:15, 2629:8, 2633:19, 2633:23, 2635:7, 2637:24, 2638:14, 2644:9, 2740:18, 2741:6
BRUNE [42] - 2553:2, 2553:5, 2554:20, 2555:3, 2555:8, 2555:19, 2556:5, 2556:7, 2560:25, 2561:5, 2564:8, 2564:16, 2568:13, 2568:21, 2568:22, 2569:10, 2590:24, 2618:14, 2619:24, 2620:16, 2620:18, 2627:20, 2627:25, 2628:3, 2629:3, 2633:15, 2634:5, 2635:23, 2636:18, 2637:17, 2638:5, 2638:15, 2644:10, 2660:1, 2663:20, 2663:24, 2664:4, 2665:11, 2673:24, 2674:11, 2742:8, 2742:12
Brune's [1] - 2571:6
brush [1] - 2617:3
BSAM [1] - 2646:25
buck [1] - 2625:23
bucks [1] - 2694:9
building [1] - 2599:1
built [1] - 2558:5
bullish [1] - 2587:3
bumps [1] - 2601:13
bunch [1] - 2578:12
burden [6] - 2669:10, 2727:9, 2733:25, 2734:4, 2734:7, 2739:7
Bureau [2] - 2553:8, 2557:14
Bush [2] - 2575:9, 2575:22
business [14] - 2556:10, 2556:11, 2556:15, 2567:19, 2576:18, 2589:5, 2593:20, 2593:23, 2600:14, 2617:15, 2663:11, 2702:16, 2704:2, 2716:12
Business [5] - 2557:11, 2557:12, 2571:13, 2605:7, 2605:22
BUTSWINKAS [44] - 2552:21, 2554:17, 2606:13, 2615:9, 2618:13, 2618:20, 2619:2, 2620:1, 2634:9, 2634:12, 2635:6, 2635:12, 2635:17, 2636:1, 2636:11, 2636:17, 2637:14, 2649:22, 2649:24, 2650:23, 2653:23, 2654:4, 2654:20, 2656:12, 2657:11, 2660:2, 2661:3, 2661:6, 2661:9, 2661:12, 2661:15, 2661:17, 2661:20, 2661:25, 2662:3, 2662:6, 2662:13, 2665:9, 2668:5, 2673:15, 2674:7, 2674:16, 2709:15, 2734:19
Butswinkas [10] - 2554:17, 2580:7, 2619:22, 2635:5, 2648:14, 2653:22, 2661:1, 2668:3, 2668:8, 2741:6
Butswinkas's [1] - 2740:16
buttal [1] - 2740:19
buy [8] - 2587:21, 2587:24, 2613:15, 2613:21, 2677:4, 2705:16, 2710:23
buyers [2] - 2692:6, 2692:13
buying [7] - 2584:17, 2584:22, 2613:22, 2627:10, 2627:13, 2628:6, 2707:19
BY [20] - 2552:16, 2552:21, 2553:5, 2556:7, 2561:5, 2568:22, 2569:16, 2589:19, 2613:17, 2614:21, 2616:2, 2618:4, 2619:13, 2620:18, 2628:3, 2629:6, 2742:8, 2742:10, 2742:12, 2742:14

C

Cadman [1] - 2552:15
calculation [1] - 2619:3
calculations [1] - 2626:8
California [1] - 2572:15
Cambridge [1] - 2557:15
CAMPBELL [1] - 2552:13
cancel [1] - 2738:25
cannot [3] - 2593:8, 2608:19, 2719:20
canon [1] - 2640:2
capable [3] - 2608:16, 2608:19, 2650:7
capacity [1] - 2559:5
capital [9] - 2559:21, 2562:18, 2563:19, 2565:5, 2581:21, 2581:24,

2582:7, 2588:24, 2631:24
Capital [1] - 2560:8
care [6] - 2560:20, 2644:2, 2675:14, 2714:18, 2722:4, 2722:13
career [2] - 2557:8, 2558:5
careful [4] - 2613:25, 2712:8, 2724:25, 2737:25
carefully [1] - 2740:20
carries [1] - 2726:24
carry [1] - 2584:16
carve [1] - 2685:10
case [124] - 2558:16, 2561:7, 2561:13, 2565:4, 2565:6, 2570:20, 2572:9, 2572:12, 2572:13, 2572:17, 2573:2, 2574:2, 2574:7, 2574:13, 2574:17, 2574:19, 2577:2, 2578:1, 2578:16, 2589:12, 2590:9, 2591:11, 2593:19, 2594:8, 2596:6, 2601:15, 2607:20, 2608:2, 2609:3, 2610:15, 2610:16, 2618:6, 2618:12, 2633:10, 2633:11, 2633:18, 2635:21, 2636:4, 2637:7, 2641:8, 2641:9, 2650:18, 2652:20, 2653:3, 2653:7, 2654:7, 2654:15, 2654:18, 2654:20, 2655:1, 2655:7, 2655:8, 2655:10, 2655:13, 2655:15, 2655:17, 2655:19, 2655:23, 2657:5, 2657:7, 2660:20, 2665:14, 2665:20, 2667:25, 2671:14, 2676:10, 2677:9, 2677:10, 2677:13, 2678:4, 2678:9, 2678:10, 2678:21, 2679:4, 2679:7, 2679:9, 2681:6, 2681:8, 2681:9, 2681:10, 2682:18, 2682:21, 2682:25, 2683:13, 2686:10, 2686:20, 2688:25, 2689:7, 2689:11, 2690:14, 2690:21, 2694:21, 2696:10, 2699:8, 2699:17, 2699:23, 2705:24, 2706:15, 2707:1, 2707:2, 2707:9, 2708:16, 2710:2, 2711:12, 2712:4, 2716:20, 2719:24, 2720:1, 2720:8, 2720:11, 2720:15, 2721:22, 2722:23, 2725:4, 2725:8, 2728:9, 2728:12, 2729:6, 2731:1, 2731:25, 2736:9, 2737:8
cases [13] - 2572:11, 2653:25, 2654:4, 2655:24, 2656:10, 2657:10, 2669:9, 2676:15, 2678:24, 2681:3, 2685:20, 2685:23, 2709:21
cash [1] - 2606:4
cashing [1] - 2689:22
categories [1] - 2561:9
category [1] - 2561:11
causal [2] - 2592:11, 2592:18
causally [1] - 2593:8
CAUSE [1] - 2552:10
caused [4] - 2585:22, 2596:7, 2596:12, 2701:25
causes [1] - 2681:12
cautionary [3] - 2667:16, 2712:7, 2732:13
CDO [1] - 2629:16
CDOs [3] - 2614:15, 2626:4, 2626:5
centered [1] - 2559:10
Central [2] - 2557:3, 2572:14
central [2] - 2559:4, 2618:10
certain [7] - 2561:20, 2561:22, 2562:8, 2578:22, 2697:11, 2715:8, 2718:5
certainly [15] - 2564:21, 2575:5, 2597:7, 2597:10, 2608:15, 2616:25, 2622:20, 2625:11, 2631:9, 2646:17, 2654:13, 2655:6, 2677:10, 2678:14, 2686:1
certificate [2] - 2686:12, 2688:12
cetera [1] - 2702:7
chain [1] - 2640:19
chair [1] - 2588:19
chaired [1] - 2560:7
chairman [4] - 2557:18, 2557:20, 2557:23, 2575:21
chance [1] - 2568:18
change [11] - 2579:5, 2581:17, 2585:15, 2614:12, 2626:24, 2627:12, 2628:14, 2649:11, 2679:8, 2687:1, 2721:7
changed [7] - 2601:3, 2624:15, 2627:4, 2633:3, 2633:8, 2638:5, 2638:6
changes [5] - 2558:17, 2558:19, 2567:11, 2601:4, 2739:13
characteristics [1] - 2602:25
characterization [1] - 2583:1
characterize [3] - 2591:1, 2618:25, 2662:1
characterized [1] - 2626:19
charge [114] - 2590:13, 2590:16, 2636:9, 2648:10, 2649:18, 2650:4, 2650:7, 2669:13, 2669:16, 2669:19, 2669:24, 2670:7, 2670:10, 2670:12, 2673:8, 2673:23, 2674:12, 2675:25, 2676:2, 2676:11, 2676:14, 2676:24, 2677:1, 2680:16, 2680:24, 2682:1, 2682:2, 2682:6, 2685:10, 2686:9, 2689:18, 2690:13, 2691:21, 2692:4, 2694:17, 2695:14, 2697:7, 2697:9, 2697:12, 2697:13, 2698:5, 2698:14, 2698:21, 2700:20, 2700:21, 2701:5, 2701:9, 2701:15, 2701:18, 2701:22, 2701:23, 2702:7, 2704:5, 2704:6, 2704:17, 2704:19, 2705:3, 2708:14, 2708:17, 2708:18, 2709:16, 2709:17, 2710:4, 2710:9, 2711:5, 2711:18, 2711:22, 2712:1, 2712:25, 2713:2, 2713:5, 2713:13, 2713:15, 2713:21, 2714:6, 2714:12, 2715:18, 2716:24, 2717:4, 2719:17, 2719:18, 2719:22, 2719:24, 2720:1, 2721:8, 2722:6, 2722:25, 2723:6, 2723:25, 2724:2, 2724:9, 2724:15, 2724:16, 2726:15, 2727:15, 2727:17, 2728:5, 2728:8, 2728:25, 2729:9, 2730:3, 2731:3, 2733:11, 2733:13, 2733:20, 2735:8, 2737:13, 2737:20, 2738:16, 2738:23, 2739:9, 2739:21, 2740:22
charged [9] - 2567:5, 2669:23, 2678:10, 2695:25, 2700:12, 2709:19, 2715:22, 2723:17, 2735:13
charges [13] - 2618:12, 2635:20, 2669:17, 2669:19, 2669:20, 2670:4, 2673:3, 2699:3, 2699:23, 2710:12, 2710:13, 2710:16, 2716:14
charging [5] - 2673:5, 2674:8, 2674:23, 2694:7, 2714:13
Chase [1] - 2664:10
chase [1] - 2596:13
chat [1] - 2638:11
chatted [1] - 2569:21
chatter [1] - 2643:9
Chavanne's [1] - 2602:21
check [1] - 2672:3
checklist [1] - 2691:9
Chicago [1] - 2557:11
Chip [3] - 2678:4, 2681:2, 2681:9
choice [1] - 2648:8
choices [2] - 2648:7, 2738:11
choose [1] - 2669:1
chronologically [1] - 2592:19
CIOFFI [1] - 2552:7
Cioffi [33] - 2552:20, 2554:9, 2554:18, 2554:24, 2574:22, 2595:10, 2598:10, 2627:9, 2627:19, 2630:19, 2638:13, 2646:9, 2658:14, 2661:7, 2661:9, 2664:22, 2665:3, 2665:9, 2674:25, 2698:2, 2699:11, 2699:15, 2701:11, 2702:2, 2703:3, 2703:7, 2707:13, 2707:17, 2710:3, 2720:22, 2737:5, 2737:9, 2737:12
Cioffi's [4] - 2574:19, 2661:5, 2712:16, 2725:17
Circuit [6] - 2652:20, 2678:24, 2680:18, 2681:24, 2690:12, 2734:12
circumscribed [1] - 2666:21
circumstances [1] - 2697:11
citation [1] - 2681:17
cite [4] - 2654:14, 2678:3, 2682:10, 2690:7
cited [2] - 2681:10, 2682:14
cites [2] - 2654:5, 2681:16
Citi [1] - 2621:18
citizens [1] - 2672:9
civil [16] - 2676:10, 2677:9, 2677:13, 2678:21, 2679:4, 2679:7, 2679:9, 2679:21, 2679:23, 2680:1, 2681:21, 2682:19, 2682:22, 2685:17, 2685:18, 2685:20
civilized [1] - 2670:2
claimed [1] - 2732:22
claims [2] - 2708:9, 2711:2
clarifications [1] - 2671:2
clarifying [1] - 2593:17
class [5] - 2556:19, 2556:20, 2556:23, 2623:1, 2681:11
classes [3] - 2567:19, 2584:23, 2623:3
classifying [1] - 2610:8
Clause [2] - 2691:19, 2692:1
clause [1] - 2691:24
clear [12] - 2579:25, 2612:23, 2656:13, 2674:4, 2677:2, 2697:15, 2700:13, 2702:25, 2710:9, 2710:17, 2711:15, 2734:25
clearer [1] - 2737:11
clearly [8] - 2595:6, 2606:10, 2627:19, 2628:15, 2628:19, 2631:2, 2652:14, 2689:8
clerk [1] - 2638:10
CLERK [2] - 2554:23, 2555:25
clerks [1] - 2733:8
clients [1] - 2674:7
close [4] - 2566:20, 2585:22, 2629:8, 2658:18
closed [4] - 2583:17, 2583:23, 2585:4,

2632:15
closing [10] - 2579:9, 2579:14, 2628:10, 2629:11, 2661:15, 2665:10, 2665:13, 2665:16, 2738:5
closings [1] - 2636:12
clue [1] - 2614:10
co [5] - 2560:7, 2587:6, 2588:19, 2710:2, 2715:3
co-chair [1] - 2588:19
co-chaired [1] - 2560:7
co-conspirators [2] - 2710:2, 2715:3
co-movement [1] - 2587:6
collapse [3] - 2585:22, 2594:12, 2630:6
collapsed [2] - 2599:2, 2631:13
collapsing [1] - 2599:12
collateral [3] - 2562:15, 2598:14, 2623:4
collateralized [2] - 2562:16, 2587:17
colleague [1] - 2638:16
colleagues [1] - 2738:4
collected [1] - 2578:23
collectively [2] - 2672:8, 2735:20
colloquial [1] - 2590:5
color [1] - 2714:12
Columbia [7] - 2556:10, 2557:7, 2571:13, 2589:5, 2593:20, 2605:7, 2605:22
combination [1] - 2621:2
comfortable [3] - 2660:8, 2680:2, 2724:1
coming [5] - 2568:17, 2574:10, 2576:21, 2621:19, 2645:6
commence [1] - 2668:21
commencing [1] - 2665:23
comment [4] - 2589:12, 2593:25, 2712:8, 2730:14
commentary [1] - 2612:12
commented [1] - 2588:23
comments [6] - 2589:20, 2590:7, 2728:3, 2728:25, 2731:14, 2739:12
commerce [3] - 2652:14, 2653:18, 2736:3
commercial [7] - 2576:13, 2588:21, 2594:4, 2621:12, 2621:13, 2621:14, 2622:22
commingle [1] - 2712:8
commingling [1] - 2712:21
Commission [4] - 2559:1, 2560:8, 2588:20, 2681:13
commit [3] - 2724:13, 2725:1, 2725:19
commitment [1] - 2671:17
committed [1] - 2726:12
common [3] - 2606:20, 2614:12, 2727:10
common-sense [1] - 2614:12
communicate [1] - 2709:10
communicated [2] - 2579:25, 2580:10
communicating [1] - 2646:9
community [1] - 2556:15
company [1] - 2595:9
comparison [2] - 2560:4, 2577:11
comparisons [1] - 2626:16
compendium [1] - 2668:23
compensated [2] - 2568:23, 2569:1
compensation [5] - 2569:24, 2646:24, 2659:7, 2659:9, 2732:23
competing [2] - 2614:5, 2614:8
complaint [1] - 2678:10
complete [2] - 2639:25, 2671:3
completed [1] - 2649:20
Completeness [3] - 2639:24, 2645:12, 2645:19
completeness [2] - 2641:6, 2647:3
completing [1] - 2638:18
Completion [6] - 2642:19, 2642:21, 2642:23, 2643:9, 2643:11, 2643:18
completion [1] - 2642:6
component [2] - 2572:23, 2685:19
comprise [1] - 2578:10
Computer [1] - 2553:14
computer [1] - 2571:8
Computer-aided [1] - 2553:14
computerized [1] - 2553:14
concentrated [1] - 2577:6
concept [6] - 2586:19, 2641:6, 2678:11, 2679:23, 2679:24, 2706:3
concepts [1] - 2561:22
conceptually [1] - 2697:9
concern [9] - 2645:5, 2703:5, 2703:6, 2707:6, 2714:2, 2716:6, 2724:4, 2724:17, 2725:7
concerned [11] - 2590:25, 2666:14, 2675:17, 2682:2, 2683:25, 2703:15, 2705:25, 2715:23, 2722:7, 2724:15, 2741:1
concerning [9] - 2646:9, 2675:16, 2686:10, 2710:20, 2711:1, 2712:15, 2722:3, 2726:12, 2727:7
concerns [4] - 2646:14, 2675:19, 2677:9, 2709:1
concludes [1] - 2636:19
concluding [3] - 2665:20, 2666:13, 2666:18
conclusion [5] - 2563:11, 2564:23, 2566:10, 2568:4, 2579:5
conclusions [15] - 2563:9, 2564:2, 2564:3, 2564:5, 2564:9, 2564:13, 2564:18, 2568:8, 2568:15, 2579:20, 2579:21, 2579:24, 2621:6, 2621:21, 2658:13
Concord [1] - 2712:15
conditional [2] - 2590:3, 2659:23
conditionally [1] - 2657:11
conditions [3] - 2558:17, 2581:18, 2625:20
conduct [4] - 2589:4, 2727:11, 2733:18, 2734:16
conducted [1] - 2595:13
Cone [1] - 2638:10
conference [11] - 2613:1, 2615:1, 2615:19, 2631:1, 2635:2, 2673:5, 2674:8, 2674:12, 2674:24, 2720:21, 2733:7
confidence [3] - 2686:1, 2702:12, 2704:17
confident [1] - 2689:15
confidential [3] - 2702:6, 2704:15, 2705:23
confidentiality [7] - 2702:8, 2702:9, 2702:11, 2703:15, 2706:3, 2706:6, 2706:8
confine [1] - 2714:6
confirm [2] - 2664:21, 2692:25
conflict [1] - 2703:14
conform [1] - 2686:9
confused [3] - 2687:19, 2697:10, 2698:23
confusing [4] - 2632:21, 2688:14, 2712:22, 2722:16
confusion [4] - 2670:25, 2697:16, 2716:19, 2725:4
Congress [1] - 2738:8
connected [1] - 2593:8
connection [17] - 2597:4, 2676:3, 2676:6, 2678:1, 2679:9, 2680:9, 2680:10, 2680:19, 2682:21, 2687:8, 2688:16, 2688:22, 2706:21, 2706:23, 2733:23, 2734:12, 2737:20
CONNOLLY [1] - 2552:19
conscious [5] - 2712:25, 2713:1, 2713:5, 2713:13, 2728:19
consent [2] - 2694:10, 2720:6
consider [15] - 2578:21, 2636:12, 2656:9, 2670:17, 2692:20, 2693:10, 2693:18, 2694:4, 2709:23, 2710:17, 2711:6, 2712:9, 2712:19, 2724:5, 2731:15
considered [5] - 2684:18, 2726:1, 2732:20, 2736:16, 2737:8
considering [1] - 2732:21
consistent [3] - 2580:1, 2582:8, 2675:13
conspiracy [22] - 2669:18, 2697:3, 2697:5, 2699:5, 2700:20, 2700:22, 2701:10, 2709:25, 2710:9, 2723:5, 2723:14, 2724:6, 2724:8, 2724:9, 2724:12, 2724:22, 2725:1, 2726:13, 2726:20, 2727:15, 2727:17
conspiratorial [1] - 2726:25
conspirators [3] - 2710:2, 2710:10, 2715:3
conspiring [1] - 2725:19
constitutes [1] - 2689:14
construction [1] - 2571:6
constructive [1] - 2711:7
constructively [1] - 2636:10
consult [2] - 2635:7, 2637:18
contained [1] - 2612:9
contend [1] - 2688:10
contending [2] - 2687:15, 2688:9
contention [1] - 2682:17
context [15] - 2677:12, 2679:5, 2680:4, 2682:5, 2682:19, 2682:22, 2685:17, 2685:18, 2689:20, 2708:4, 2708:9, 2708:16, 2720:3, 2723:24, 2737:8
continuation [2] - 2640:19, 2673:4
continue [11] - 2561:4, 2564:25, 2582:6, 2583:12, 2585:24, 2586:4, 2589:17, 2596:17, 2598:21, 2619:24, 2710:24
Continued [3] - 2553:1, 2636:20, 2651:1
continued [3] - 2624:24, 2625:2, 2634:14

continues [1] - 2710:4
continuing [3] - 2637:10, 2676:2, 2677:20
Continuing [6] - 2613:18, 2614:22, 2616:3, 2618:5, 2619:14, 2628:4
contract [1] - 2587:11
contracts [16] - 2565:23, 2567:11, 2584:22, 2584:25, 2585:11, 2585:12, 2587:10, 2587:24, 2588:1, 2588:6, 2597:17, 2617:4, 2617:19, 2625:22
contrary [1] - 2677:10
contributed [1] - 2621:13
control [1] - 2703:18
controlling [2] - 2652:20, 2736:15
convenient [1] - 2635:13
conventional [1] - 2565:15
conversation [2] - 2614:25, 2615:21
convict [1] - 2714:3
convicted [1] - 2700:14
conviction [1] - 2699:9
convicts [1] - 2682:4
convinced [1] - 2695:19
cooperate [1] - 2650:20
copies [1] - 2670:20
copy [3] - 2646:4, 2670:7, 2726:16
corporate [6] - 2559:14, 2559:16, 2559:18, 2559:19, 2565:9, 2736:14
corporation [1] - 2719:9
corporations [2] - 2559:20, 2711:20
correct [81] - 2572:24, 2572:25, 2573:6, 2574:8, 2574:9, 2576:19, 2576:24, 2577:2, 2577:3, 2578:2, 2578:8, 2578:14, 2579:22, 2580:4, 2580:5, 2580:13, 2581:10, 2581:13, 2581:19, 2581:20, 2582:9, 2583:21, 2590:11, 2590:14, 2591:5, 2591:23, 2592:9, 2592:16, 2592:24, 2594:2, 2594:7, 2595:11, 2595:14, 2597:22, 2598:7, 2598:8, 2598:16, 2598:17, 2598:24, 2599:14, 2599:19, 2599:25, 2600:4, 2601:3, 2601:17, 2603:17, 2604:9, 2604:19, 2605:7, 2605:12, 2606:8, 2607:23, 2609:3, 2610:18, 2611:11, 2616:18, 2629:12, 2631:8, 2631:21, 2633:6, 2659:18, 2662:13, 2687:24, 2687:25, 2693:21, 2693:23, 2695:7, 2699:16, 2702:3, 2704:21, 2708:14, 2708:18, 2716:24, 2717:22, 2718:7, 2719:17, 2719:18, 2719:22, 2719:25, 2720:4, 2726:4
corrective [1] - 2712:12
correctly [3] - 2656:24, 2666:6, 2724:10
correlated [3] - 2596:24, 2597:10, 2712:5
correlation [3] - 2585:17, 2596:21, 2597:4
correspondence [1] - 2579:8
Counsel [3] - 2554:10, 2557:18, 2557:21
counsel [15] - 2554:14, 2554:25, 2574:13, 2580:8, 2582:4, 2635:3, 2648:3, 2649:2, 2679:2, 2686:14, 2698:3, 2698:5, 2706:2, 2712:3, 2731:1
counsel's [2] - 2646:12, 2648:7
count [1] - 2697:4
Count [5] - 2652:13, 2653:12, 2653:14, 2656:13, 2737:5
Count One [1] - 2723:4
Count Three [1] - 2710:21
Count Two [1] - 2710:18
counted [1] - 2570:23
counter [1] - 2584:21
counterpart [1] - 2596:14
counterparties [1] - 2630:12
counters [1] - 2698:25
counts [1] - 2708:6
couple [8] - 2573:10, 2622:10, 2630:7, 2638:14, 2638:25, 2640:17, 2720:22, 2735:18
course [33] - 2566:12, 2566:19, 2567:16, 2575:2, 2578:7, 2578:10, 2578:17, 2581:1, 2583:14, 2589:4, 2604:16, 2607:6, 2608:1, 2614:6, 2615:5, 2626:19, 2630:16, 2666:7, 2666:22, 2667:1, 2668:6, 2672:1, 2672:3, 2676:17, 2680:18, 2690:22, 2690:25, 2708:22, 2716:11, 2717:1, 2718:18, 2719:6, 2737:5
Court [29] - 2553:11, 2553:11, 2554:4, 2635:3, 2636:11, 2639:2, 2646:4, 2649:12, 2655:8, 2663:21, 2678:4, 2681:4, 2681:16, 2681:24, 2691:25, 2697:22, 2704:11, 2711:13, 2712:2, 2716:6, 2724:16, 2725:6, 2728:8, 2729:1, 2730:20, 2731:15, 2732:20, 2737:14, 2739:13
court [17] - 2554:1, 2554:2, 2560:21, 2560:23, 2574:11, 2574:14, 2637:1, 2652:2, 2670:20, 2672:11, 2673:1, 2674:20, 2680:18, 2683:6, 2690:12, 2717:4, 2722:11
Court's [7] - 2637:14, 2645:5, 2654:14, 2669:13, 2674:5, 2709:25, 2732:10
court's [2] - 2648:21, 2655:22
Courthouse [1] - 2552:5
courtroom [5] - 2620:5, 2620:13, 2637:8, 2660:13, 2672:16
COURTROOM [11] - 2554:3, 2554:7, 2620:4, 2620:12, 2620:14, 2645:23, 2650:13, 2652:4, 2660:12, 2660:14, 2672:15
covered [2] - 2592:3, 2662:12
covering [1] - 2585:20
covers [1] - 2644:11
crack [1] - 2573:20
crafted [1] - 2695:14
crazy [1] - 2604:17
created [1] - 2716:20
credibility [2] - 2669:11, 2700:6
credit [10] - 2587:21, 2588:2, 2588:25, 2621:11, 2622:1, 2624:7, 2624:12, 2624:13, 2632:11, 2700:4
CRI [1] - 2553:11
crime [4] - 2689:14, 2722:3, 2722:12, 2733:20
crimes [1] - 2669:23
CRIMINAL [1] - 2552:10
criminal [24] - 2554:7, 2554:23, 2618:12, 2654:6, 2654:22, 2678:24, 2679:5, 2679:9, 2679:20, 2679:23, 2680:1, 2680:3, 2681:7, 2681:9, 2682:19, 2682:22, 2682:24, 2683:8, 2685:17, 2685:23, 2689:20, 2691:8, 2707:22, 2715:4
criminalize [2] - 2690:5, 2690:6
criminally [1] - 2715:10
crisis [1] - 2609:1
CROSS [2] - 2569:15, 2742:9
cross [2] - 2564:14, 2570:25
cross-examine [1] - 2564:14
CRR [1] - 2553:11
crux [2] - 2689:5, 2706:15
crystallized [1] - 2685:16
CSR [1] - 2553:11
culpable [1] - 2715:10
cum [1] - 2557:2
cure [1] - 2652:25
curious [3] - 2584:6, 2615:12, 2672:3
current [5] - 2556:8, 2594:23, 2622:24, 2734:11, 2735:7
cushion [3] - 2581:24, 2623:10, 2623:23
custodian [1] - 2647:1
cut [8] - 2596:13, 2619:21, 2623:3, 2647:9, 2662:19, 2700:13, 2727:18, 2741:7
cuts [1] - 2627:4

D

D.C [1] - 2552:21
daily [1] - 2617:5
damages [1] - 2625:18
Dane [1] - 2554:17
DANE [1] - 2552:21
data [39] - 2562:8, 2562:11, 2562:12, 2562:14, 2563:4, 2573:11, 2573:12, 2573:13, 2586:22, 2597:18, 2608:21, 2609:1, 2609:2, 2609:4, 2609:5, 2609:6, 2609:7, 2609:20, 2609:21, 2609:23, 2610:2, 2610:3, 2610:4, 2610:6, 2610:10, 2611:6, 2616:6, 2616:9, 2617:4, 2617:20, 2617:22, 2617:23, 2625:6, 2631:3, 2631:5
database [2] - 2610:4, 2631:6
date [13] - 2593:4, 2658:23, 2661:23, 2662:8, 2663:8, 2664:24, 2665:7, 2742:20, 2742:24, 2743:1, 2743:3, 2743:5, 2743:7
dates [1] - 2563:19
days [1] - 2667:3
de [1] - 2703:18
deal [15] - 2589:13, 2593:9, 2643:25, 2647:13, 2657:1, 2657:17, 2658:17, 2660:22, 2673:22, 2675:24, 2682:1, 2682:4, 2692:22, 2715:7, 2716:13
dealing [9] - 2567:21, 2630:11, 2647:24, 2657:19, 2678:8, 2707:6, 2725:2, 2725:22, 2726:3
deals [3] - 2676:15, 2701:25, 2702:2
dealt [2] - 2682:3, 2691:1
dean [5] - 2556:9, 2556:13, 2556:14, 2571:12, 2605:22
debating [1] - 2595:6

debt [7] - 2558:1, 2559:21, 2562:16, 2567:7, 2587:17, 2593:10, 2594:15
deception [1] - 2708:12
decide [3] - 2588:10, 2604:20, 2695:4
decided [1] - 2601:16
decision [20] - 2559:22, 2581:5, 2581:6, 2581:11, 2582:6, 2583:12, 2583:13, 2593:15, 2596:21, 2597:5, 2601:9, 2624:11, 2627:4, 2629:1, 2655:22, 2674:5, 2680:7, 2680:19, 2681:9, 2682:9
decisions [2] - 2608:17, 2614:12
decline [2] - 2585:10, 2632:10
declines [1] - 2632:12
default [3] - 2587:22, 2587:23, 2588:2
defendant [10] - 2641:3, 2641:8, 2641:14, 2659:4, 2661:5, 2674:25, 2677:18, 2703:16, 2730:8, 2732:21
Defendant [2] - 2552:19, 2552:19
defendant's [6] - 2591:12, 2640:23, 2641:13, 2643:4, 2691:20, 2736:17
Defendant's Exhibit [14] - 2639:1, 2639:24, 2640:18, 2646:10, 2658:8, 2661:3, 2661:22, 2662:7, 2662:23, 2662:25, 2742:23, 2742:25, 2743:2, 2743:4
Defendant's Exhibits [3] - 2658:22, 2663:7, 2743:6
Defendants [1] - 2554:2
defendants [32] - 2552:9, 2590:13, 2591:4, 2603:17, 2642:2, 2646:16, 2650:12, 2657:22, 2661:2, 2662:10, 2664:22, 2667:4, 2667:10, 2668:1, 2674:18, 2676:1, 2676:11, 2676:22, 2676:23, 2677:21, 2681:23, 2697:1, 2700:13, 2702:19, 2707:11, 2709:14, 2710:3, 2717:7, 2722:17, 2729:12, 2733:17, 2733:19
defendants' [4] - 2661:6, 2707:5, 2736:23, 2737:3
defense [18] - 2555:19, 2582:4, 2582:15, 2608:22, 2637:21, 2648:7, 2652:11, 2660:23, 2679:1, 2681:1, 2686:14, 2691:5, 2715:6, 2722:3, 2722:12, 2730:8, 2731:2, 2741:2
deferred [1] - 2630:10
defines [1] - 2704:14
defining [1] - 2689:17
definition [2] - 2693:17, 2694:13
definitively [1] - 2697:24
defraud [8] - 2716:22, 2717:2, 2721:12, 2721:15, 2721:18, 2732:19, 2732:22, 2732:25
defrauded [1] - 2688:9
degrees [2] - 2557:2, 2557:4
delevering [1] - 2622:14
deliberate [1] - 2672:9
deliberation [1] - 2671:14
deliberations [11] - 2655:24, 2655:25, 2665:23, 2668:21, 2669:5, 2669:25, 2670:16, 2671:3, 2672:7, 2672:9, 2719:3
deliver [1] - 2670:8
delivering [3] - 2666:19, 2667:14, 2667:21
DelVecchio [1] - 2664:9
demand [1] - 2558:17
demonstrative [2] - 2566:9, 2567:17
Dengler [3] - 2553:8, 2554:15, 2641:21
denied [1] - 2710:15
Department [3] - 2557:17, 2558:3, 2558:6
departments [1] - 2608:14
departure [1] - 2624:4
depth [1] - 2589:15
DEPUTY [11] - 2554:3, 2554:7, 2620:4, 2620:12, 2620:14, 2645:23, 2650:13, 2652:4, 2660:12, 2660:14, 2672:15
deputy [1] - 2557:16
derivative [5] - 2584:25, 2587:7, 2587:10, 2587:11, 2617:19
derivatives [2] - 2560:10, 2575:15
describe [7] - 2561:9, 2565:2, 2571:10, 2582:25, 2604:15, 2622:11, 2624:5
described [2] - 2571:14, 2623:20
design [2] - 2576:15, 2741:2
designed [2] - 2605:18, 2723:1
desire [1] - 2732:22
despite [1] - 2688:20
detail [1] - 2561:10
detailed [1] - 2570:24
deter [1] - 2689:22
deteriorate [1] - 2625:20
determinations [1] - 2712:21
determinative [1] - 2699:9
determine [2] - 2620:20, 2624:1
determined [3] - 2621:6, 2729:19, 2730:23
device [1] - 2716:22
dialogue [2] - 2637:10, 2678:5
difference [5] - 2613:9, 2679:25, 2685:17, 2696:16, 2734:15
differences [2] - 2560:5, 2679:20
different [24] - 2559:21, 2585:12, 2597:1, 2597:21, 2597:23, 2597:24, 2600:13, 2603:13, 2603:22, 2604:3, 2604:7, 2604:8, 2604:11, 2604:18, 2613:7, 2613:14, 2624:2, 2641:9, 2641:11, 2654:1, 2711:19, 2723:2, 2734:3, 2737:17
differently [1] - 2714:10
difficult [1] - 2586:18
direct [10] - 2571:15, 2577:25, 2618:18, 2653:3, 2655:10, 2655:19, 2669:24, 2700:14, 2717:6, 2732:10
DIRECT [2] - 2556:6, 2742:7
directing [1] - 2615:18
direction [6] - 2569:9, 2585:9, 2627:7, 2650:22, 2690:1, 2705:13
directly [2] - 2576:20, 2647:18
director [1] - 2595:9
directors [1] - 2736:14
disagree [2] - 2600:11, 2684:20
disagreed [1] - 2600:9
disallowed [1] - 2660:25
disappeared [1] - 2632:20
discharge [1] - 2671:7
disclose [13] - 2705:8, 2705:18, 2706:11, 2706:14, 2707:15, 2707:18, 2707:25, 2708:1, 2708:17, 2719:1, 2719:7, 2719:15
disclosed [9] - 2591:4, 2591:12, 2591:16, 2613:23, 2615:5, 2617:5, 2718:19, 2719:4, 2719:5
disclosing [3] - 2591:23, 2612:25, 2613:25
disclosure [4] - 2560:10, 2615:17, 2707:9, 2707:22
disclosures [1] - 2698:19
discovery [1] - 2555:4
discretion [3] - 2696:11, 2701:6, 2703:24
discuss [7] - 2635:20, 2648:11, 2663:17, 2666:10, 2679:21, 2691:11, 2721:12
discussed [10] - 2579:12, 2579:14, 2629:7, 2706:4, 2717:17, 2734:23, 2734:24, 2735:15, 2737:15, 2737:23
discussing [1] - 2579:9
discussion [2] - 2697:25, 2701:25
dismiss [2] - 2710:13, 2737:5
disputing [1] - 2654:2
disrupted [1] - 2576:11
dissecting [1] - 2573:11
distance [1] - 2740:13
distill [1] - 2589:22
distilling [1] - 2589:23
distinction [3] - 2682:19, 2682:22, 2712:3
distinguish [1] - 2614:6
distraction [1] - 2602:6
distressed [3] - 2586:12, 2599:4, 2623:16
DISTRICT [3] - 2552:1, 2552:1, 2552:11
district [1] - 2655:22
District [6] - 2552:14, 2554:4, 2569:20, 2572:14, 2654:15
doable [2] - 2649:18, 2649:21
Docket [1] - 2554:8
doctor [1] - 2590:8
Document [1] - 2658:8
document [14] - 2641:20, 2643:1, 2644:21, 2645:1, 2645:3, 2645:11, 2646:7, 2647:17, 2647:21, 2652:21, 2657:25, 2658:3, 2661:19, 2670:9
documentary [1] - 2662:10
documents [24] - 2571:7, 2606:24, 2607:22, 2607:24, 2608:1, 2635:23, 2636:13, 2637:24, 2638:2, 2638:7, 2638:8, 2638:12, 2638:18, 2638:24, 2644:7, 2645:5, 2648:2, 2657:24, 2658:25, 2659:9, 2660:23, 2662:18, 2662:20, 2663:9
DOE [1] - 2558:10
dollars [9] - 2566:23, 2566:24, 2572:21, 2596:15, 2599:2, 2601:20, 2605:1, 2720:22, 2725:18
domain [1] - 2689:22
dominance [1] - 2703:18
done [15] - 2558:25, 2562:19, 2575:7, 2577:9, 2588:13, 2589:1, 2622:20, 2626:11, 2626:12, 2650:7, 2717:2, 2726:17, 2735:20, 2738:16

door [1] - 2642:4
double [2] - 2620:25, 2621:3
doubt [2] - 2656:14, 2669:11
down [31] - 2558:9, 2571:8, 2571:10, 2582:23, 2582:25, 2585:13, 2620:11, 2623:12, 2624:9, 2624:12, 2624:13, 2624:19, 2625:4, 2625:6, 2625:8, 2626:14, 2626:18, 2634:7, 2656:18, 2656:24, 2666:5, 2670:4, 2670:7, 2670:13, 2682:2, 2682:6, 2690:13, 2707:18, 2716:1, 2735:16, 2739:6
downward [1] - 2625:2
dozen [1] - 2638:15
Dr [14] - 2555:4, 2555:10, 2560:25, 2561:6, 2568:17, 2569:17, 2569:23, 2571:12, 2575:2, 2576:21, 2577:22, 2579:22, 2589:22, 2633:18
draft [7] - 2709:16, 2709:17, 2710:4, 2711:5, 2728:25, 2730:3, 2738:5
drafted [6] - 2571:5, 2657:15, 2675:5, 2675:13, 2675:20, 2698:11
draftsman [1] - 2571:20
dramatically [1] - 2597:14
draw [3] - 2617:13, 2624:18, 2712:3
drawn [1] - 2608:25
driven [2] - 2609:6, 2609:20
Drug [1] - 2681:10
due [2] - 2609:10, 2658:24
duly [1] - 2555:23
duration [1] - 2625:5
during [39] - 2566:12, 2567:7, 2571:14, 2575:2, 2576:5, 2577:25, 2579:7, 2581:1, 2582:10, 2583:11, 2585:17, 2591:18, 2597:16, 2597:22, 2600:16, 2600:17, 2600:18, 2608:1, 2608:23, 2609:8, 2610:17, 2616:10, 2618:8, 2622:2, 2623:17, 2623:21, 2626:22, 2627:2, 2628:5, 2629:21, 2630:13, 2630:20, 2632:19, 2660:22, 2664:13, 2666:22, 2674:7, 2708:21, 2726:13
duties [1] - 2705:10
duty [20] - 2702:1, 2702:15, 2705:7, 2705:10, 2705:14, 2705:18, 2705:19, 2706:8, 2706:9, 2706:10, 2706:14, 2706:18, 2706:20, 2707:8, 2707:15, 2707:22, 2708:12, 2718:25, 2719:1, 2719:4
dwell [2] - 2627:21, 2680:23

E

e-mail [31] - 2579:12, 2579:14, 2579:17, 2579:19, 2627:11, 2627:16, 2628:20, 2633:11, 2642:22, 2643:3, 2643:11, 2643:16, 2643:23, 2644:18, 2645:11, 2645:17, 2646:15, 2652:13, 2656:14, 2659:3, 2659:5, 2661:16, 2662:3, 2662:4, 2664:8, 2664:12, 2664:14, 2664:21, 2725:3, 2725:9, 2739:6
E-mail [1] - 2553:13
e-mails [18] - 2579:6, 2579:9, 2627:8, 2628:10, 2628:12, 2628:15, 2633:2, 2633:10, 2633:18, 2633:21, 2640:23, 2652:17, 2663:2, 2663:3, 2664:16, 2736:3, 2736:9
early [5] - 2558:5, 2566:12, 2579:10, 2636:8, 2666:2
earned [1] - 2565:9
earning [2] - 2584:18, 2625:12
earns [1] - 2565:6
easier [1] - 2698:22
East [1] - 2552:15
EASTERN [1] - 2552:1
Eastern [3] - 2552:14, 2554:4, 2569:20
easy [2] - 2597:25, 2650:19
echo [1] - 2679:17
Economic [3] - 2557:14, 2557:18, 2557:21
economic [14] - 2557:20, 2557:22, 2558:15, 2561:22, 2562:24, 2563:13, 2575:22, 2576:6, 2589:16, 2600:11, 2600:14, 2615:16, 2617:7, 2618:10
economically [3] - 2564:24, 2603:20, 2616:19
economics [9] - 2556:11, 2557:5, 2559:11, 2559:12, 2559:15, 2560:17, 2561:1, 2584:12, 2591:20
economist [2] - 2559:10, 2580:20
economists [3] - 2557:21, 2559:11, 2601:6
economy [9] - 2558:6, 2558:14, 2558:17, 2558:20, 2584:9, 2600:15, 2600:17, 2601:1, 2616:7
Edelstein [2] - 2674:12, 2679:16
EDELSTEIN [43] - 2553:6, 2657:4, 2675:18, 2679:16, 2682:8, 2682:11, 2682:14, 2683:9, 2683:16, 2683:19, 2683:21, 2684:2, 2684:6, 2684:15, 2684:17, 2688:14, 2694:11, 2694:19, 2695:1, 2699:20, 2700:2, 2700:8, 2700:16, 2700:24, 2701:2, 2701:14, 2701:17, 2728:3, 2728:13, 2728:18, 2728:23, 2729:7, 2729:16, 2729:21, 2729:23, 2730:15, 2730:20, 2731:14, 2731:19, 2732:17, 2737:11, 2737:19, 2737:24
edification [1] - 2722:11
edit [2] - 2723:10, 2736:11
edits [1] - 2735:24
educated [1] - 2589:6
education [1] - 2605:15
educational [1] - 2556:24
egg [1] - 2666:22
eighty [5] - 2569:6, 2570:3, 2570:19, 2574:6, 2574:15
either [6] - 2570:23, 2594:11, 2615:1, 2661:14, 2704:3, 2710:18
elaborate [4] - 2729:23, 2729:25, 2730:22, 2733:6
elected [1] - 2710:11
election [1] - 2555:16
element [23] - 2565:10, 2567:1, 2653:24, 2654:6, 2654:11, 2654:21, 2655:9, 2655:18, 2697:8, 2697:12, 2704:14, 2713:20, 2715:15, 2715:22, 2716:2, 2716:7, 2717:1, 2717:20, 2721:12, 2722:2, 2733:20, 2736:12
elements [8] - 2617:2, 2617:22, 2669:22, 2684:3, 2714:4, 2714:7, 2715:19, 2715:25
eleven [1] - 2572:21
eliminate [4] - 2710:5, 2720:6, 2723:2, 2728:15
eliminated [1] - 2723:1
eliminating [1] - 2720:5
embodied [1] - 2679:24
embrace [4] - 2586:19, 2691:20, 2694:3, 2698:3
embraced [1] - 2679:23
empirical [1] - 2567:14
employed [1] - 2595:9
employee [3] - 2570:11, 2646:24, 2647:4
employees [3] - 2570:10, 2646:22, 2664:18
employment [1] - 2556:8
enactment [1] - 2713:25
encourage [3] - 2681:22, 2687:21, 2687:23
encouraged [2] - 2688:3, 2688:5
end [31] - 2563:14, 2566:1, 2566:2, 2566:19, 2567:8, 2576:12, 2580:21, 2581:14, 2582:7, 2583:7, 2583:20, 2583:22, 2583:24, 2586:7, 2587:16, 2588:9, 2590:4, 2593:10, 2596:14, 2599:6, 2601:20, 2611:17, 2621:16, 2622:7, 2649:20, 2668:13, 2668:17, 2698:16, 2740:2
ended [2] - 2604:4, 2604:5
ends [2] - 2583:4, 2603:19
Energy [2] - 2558:4, 2558:5
engage [1] - 2703:12
engaged [4] - 2567:12, 2701:11, 2723:12, 2727:11
engaging [1] - 2716:11
Engineer [1] - 2664:9
English [1] - 2593:21
Enhanced [17] - 2562:4, 2566:25, 2582:19, 2601:19, 2606:25, 2608:10, 2621:15, 2623:19, 2628:17, 2628:22, 2629:25, 2710:21, 2710:22, 2710:23, 2711:1, 2712:16, 2712:17
enter [1] - 2584:7
entered [1] - 2662:15
enters [2] - 2620:13, 2660:13
entire [3] - 2571:9, 2582:18, 2599:1
entirely [3] - 2603:14, 2641:9, 2696:9
entitled [6] - 2615:14, 2676:13, 2676:24, 2677:14, 2697:1, 2731:4
entity [1] - 2702:18
entry [1] - 2640:9
environment [1] - 2627:7
equally [1] - 2656:21
equation [1] - 2586:19
equity [11] - 2556:19, 2565:5, 2567:4, 2567:6, 2586:3, 2586:14, 2594:13, 2599:5, 2599:23, 2600:2, 2632:15
equivalent [2] - 2684:1, 2688:7
especially [1] - 2686:14
ESQ [12] - 2552:13, 2552:16, 2552:16, 2552:17, 2552:17, 2552:21, 2552:22, 2552:22, 2553:5, 2553:5, 2553:6, 2553:6

essence [1] - 2653:1
essential [1] - 2697:8
essentially [3] - 2565:3, 2625:19, 2695:11
establish [11] - 2654:11, 2654:12, 2655:9, 2655:10, 2655:18, 2655:19, 2656:14, 2684:11, 2685:12, 2705:19, 2732:25
established [2] - 2653:17, 2695:18
establishes [1] - 2711:3
establishing [1] - 2668:12
estate [2] - 2576:13, 2725:10
esteem [1] - 2605:7
estimate [1] - 2649:9
et [1] - 2702:6
evaluating [2] - 2722:4, 2722:13
evening [2] - 2689:25, 2739:18
evenly [1] - 2716:8
event [1] - 2638:17
Everstone [1] - 2557:9
evidence [51] - 2637:23, 2637:25, 2638:25, 2640:6, 2640:20, 2642:5, 2643:1, 2643:8, 2643:15, 2645:3, 2645:6, 2645:9, 2647:9, 2647:13, 2647:18, 2648:2, 2652:21, 2655:4, 2657:23, 2658:23, 2660:24, 2661:1, 2661:2, 2661:22, 2662:7, 2662:10, 2663:8, 2663:9, 2663:10, 2665:6, 2665:19, 2672:2, 2676:21, 2684:11, 2686:9, 2687:20, 2696:3, 2697:16, 2697:19, 2700:12, 2700:14, 2700:16, 2712:4, 2717:7, 2717:9, 2742:19, 2742:23, 2742:25, 2743:2, 2743:4, 2743:7
evidentiary [2] - 2635:24, 2643:8
ex [6] - 2581:2, 2632:21, 2632:25, 2633:1
ex-ante [2] - 2632:21, 2632:25
ex-post [2] - 2632:21, 2633:1
exact [1] - 2570:21
exactly [7] - 2604:11, 2667:9, 2681:8, 2702:22, 2716:14, 2716:25, 2722:18
EXAMINATION [14] - 2556:6, 2569:15, 2613:16, 2614:20, 2616:1, 2618:3, 2619:12, 2620:17, 2628:2, 2629:5, 2742:7, 2742:9, 2742:11, 2742:13
examination [2] - 2577:25, 2618:18
examine [1] - 2564:14
examined [1] - 2555:23
examining [1] - 2740:9
example [14] - 2558:23, 2560:2, 2561:23, 2617:1, 2617:6, 2638:20, 2638:23, 2679:21, 2711:18, 2719:3, 2720:17, 2721:2, 2725:18, 2732:8
examples [2] - 2567:17, 2615:20
except [1] - 2650:4
exception [4] - 2645:17, 2692:16, 2692:25, 2694:11
exceptions [1] - 2721:8
Exchange [1] - 2681:13
exchange [2] - 2664:12, 2664:14
excluded [1] - 2646:13
excuse [3] - 2590:6, 2638:16, 2731:18
excused [3] - 2674:7, 2674:11, 2674:18
execute [1] - 2601:16
exegesis [3] - 2627:15, 2627:18, 2628:19
exercise [5] - 2609:6, 2609:20, 2624:23, 2722:4, 2722:13
Exhibit [10] - 2633:12, 2639:4, 2640:11, 2647:5, 2658:12, 2661:25, 2665:2, 2665:6, 2685:7, 2742:19
exhibit [5] - 2633:13, 2642:18, 2644:18, 2650:10, 2669:1
EXHIBITS [1] - 2742:17
exhibits [6] - 2571:6, 2643:25, 2650:9, 2668:23, 2668:24, 2670:24
exhort [1] - 2686:2
exist [2] - 2702:13, 2703:24
existence [2] - 2726:13, 2727:7
existing [1] - 2621:25
exit [1] - 2593:10
exits [3] - 2620:5, 2637:8, 2672:16
expect [12] - 2565:21, 2585:10, 2585:13, 2586:18, 2624:20, 2624:22, 2625:21, 2626:17, 2650:20, 2671:16, 2691:8
expectation [5] - 2580:18, 2582:18, 2583:6, 2583:10, 2603:24
expectations [7] - 2580:15, 2581:12, 2582:8, 2584:2, 2590:1, 2590:17, 2603:25
expected [5] - 2585:3, 2585:6, 2624:8, 2624:21, 2626:25
expecting [1] - 2573:4
experience [5] - 2573:21, 2576:23, 2622:25, 2623:2, 2695:2
experienced [1] - 2679:2
expert [5] - 2560:21, 2560:23, 2560:25, 2606:18, 2695:10
expertise [1] - 2606:19
experts [2] - 2567:24, 2572:2
explain [23] - 2561:20, 2562:5, 2563:17, 2564:12, 2564:17, 2567:24, 2568:3, 2585:6, 2587:10, 2592:10, 2611:14, 2613:9, 2614:18, 2622:18, 2625:7, 2626:1, 2640:15, 2658:21, 2669:17, 2669:22, 2670:6, 2671:1, 2680:17
explained [2] - 2610:10, 2617:25
explaining [2] - 2559:19, 2617:14
explanation [1] - 2558:14
Express [1] - 2711:20
extended [1] - 2637:4
extent [2] - 2589:11, 2706:19
extra [1] - 2621:24

F

F.2d [1] - 2676:4
face [3] - 2652:15, 2656:14, 2675:9
faced [1] - 2649:17
facilities [2] - 2621:11, 2623:4
facility [7] - 2621:19, 2621:20, 2621:24, 2628:18, 2628:23, 2629:7, 2736:3
Facsimile [1] - 2553:12
fact [44] - 2566:6, 2574:10, 2626:23, 2631:4, 2631:20, 2641:18, 2652:24, 2669:13, 2679:19, 2682:15, 2683:10, 2684:8, 2685:11, 2688:15, 2690:20, 2693:1, 2693:15, 2700:8, 2704:2, 2705:21, 2707:3, 2707:13, 2715:2, 2715:6, 2716:4, 2716:20, 2717:8, 2717:14, 2718:11, 2718:16, 2719:13, 2719:15, 2719:25, 2720:11, 2720:12, 2720:24, 2726:12, 2732:2, 2732:4, 2732:8, 2732:15, 2733:17, 2733:25
facto [1] - 2703:18
factor [4] - 2592:11, 2592:18, 2597:11, 2691:7
factors [4] - 2585:20, 2592:6, 2592:7, 2592:8
facts [12] - 2632:22, 2683:2, 2684:9, 2688:18, 2688:24, 2700:24, 2709:21, 2719:24, 2720:3, 2728:9, 2730:25, 2732:6
factually [1] - 2592:24
faculty [2] - 2556:15, 2556:22
fail [1] - 2596:7
failed [4] - 2592:2, 2592:5, 2592:7, 2598:2
failure [1] - 2719:14
fair [13] - 2571:21, 2576:22, 2577:4, 2580:18, 2582:23, 2582:24, 2607:19, 2617:9, 2671:13, 2691:17, 2730:10, 2740:24, 2741:12
fairly [1] - 2671:8
fairness [1] - 2692:22
faith [1] - 2698:3
faithful [1] - 2676:9
fall [9] - 2585:10, 2586:24, 2587:1, 2588:4, 2597:20, 2616:23, 2623:8, 2638:18
falls [2] - 2616:23, 2657:1
false [1] - 2684:12
familiar [2] - 2608:4, 2682:9
far [10] - 2569:4, 2569:24, 2586:7, 2589:8, 2590:25, 2594:7, 2599:9, 2629:19, 2639:13, 2724:2
fashion [1] - 2650:16
fast [2] - 2650:7, 2692:2
faster [1] - 2587:1
favor [1] - 2671:8
favorable [2] - 2600:22, 2697:13
fax [1] - 2736:4
fear [1] - 2671:8
February [3] - 2563:15, 2566:2, 2583:8
Fed [1] - 2559:5
Federal [5] - 2553:8, 2559:2, 2559:3, 2559:4, 2559:5
federal [3] - 2576:7, 2576:11, 2683:6
fee [1] - 2574:10
feedback [1] - 2558:19
fell [1] - 2625:16
felt [1] - 2600:23
few [8] - 2558:23, 2560:7, 2567:10, 2584:14, 2597:9, 2635:6, 2637:12, 2728:3
fickled [1] - 2604:12
fickled" [1] - 2604:15
fiduciary [12] - 2698:18, 2702:1, 2702:12, 2702:15, 2703:17, 2703:19, 2703:23, 2703:24, 2703:25, 2704:4,

2705:10, 2705:20
field [1] - 2561:1
fifteen [1] - 2718:4
fifty [1] - 2566:24
figure [2] - 2594:19, 2655:11
figured [2] - 2610:6, 2632:7
file [2] - 2734:11, 2735:7
filed [3] - 2673:19, 2734:22, 2736:24
files [1] - 2562:17
final [3] - 2571:17, 2736:11, 2739:10
finally [4] - 2628:8, 2664:20, 2726:15, 2735:6
finance [12] - 2556:11, 2557:25, 2559:14, 2559:16, 2559:18, 2559:19, 2559:20, 2561:1, 2565:16, 2594:4, 2597:12
financial [14] - 2556:20, 2559:8, 2559:11, 2559:15, 2559:22, 2560:19, 2575:18, 2575:19, 2576:1, 2576:2, 2576:3, 2576:5, 2600:19, 2695:2
financing [3] - 2588:17, 2621:7, 2621:10
finders [1] - 2669:13
findings [2] - 2577:14, 2577:23
fine [12] - 2568:13, 2602:5, 2636:9, 2647:25, 2648:10, 2650:3, 2674:10, 2710:6, 2710:7, 2721:19, 2724:3, 2726:5
finish [5] - 2615:9, 2691:10, 2740:2, 2740:15, 2741:8
finished [2] - 2668:12, 2740:9
finishing [2] - 2610:14, 2660:21
firm [4] - 2559:23, 2569:8, 2570:8, 2677:21
firm's [3] - 2632:6, 2664:11, 2677:22
firms [2] - 2559:13, 2565:7
first [36] - 2555:23, 2564:22, 2565:2, 2568:2, 2575:9, 2579:24, 2580:14, 2580:21, 2584:14, 2592:8, 2592:25, 2622:16, 2623:18, 2638:22, 2638:23, 2639:1, 2644:16, 2650:5, 2660:21, 2664:18, 2668:4, 2669:8, 2673:10, 2674:25, 2676:20, 2704:13, 2705:6, 2705:7, 2709:3, 2713:20, 2716:1, 2716:8, 2716:24, 2736:12, 2740:16
firstly [1] - 2668:19
fish [1] - 2653:4
five [5] - 2582:22, 2638:17, 2653:21, 2653:23
Fix [1] - 2602:21
flashing [2] - 2622:11, 2623:20
flesh [2] - 2645:2, 2696:3
flexible [2] - 2641:5, 2671:18
Florida [1] - 2557:3
flush [1] - 2708:15
fly [1] - 2584:7
focus [11] - 2575:24, 2609:13, 2674:23, 2690:11, 2691:17, 2692:5, 2707:21, 2720:15, 2723:19, 2724:21, 2730:25
focused [3] - 2602:10, 2707:2, 2735:18
focuses [2] - 2685:11, 2702:9
focusing [1] - 2682:7
fold [1] - 2678:7
folks [7] - 2567:21, 2570:15, 2585:23, 2620:11, 2643:23, 2695:12, 2735:21
follow [2] - 2614:23, 2645:4
follow-up [1] - 2614:23
Followed [1] - 2611:23
following [4] - 2677:13, 2717:8, 2717:14, 2737:14
follows [2] - 2555:24, 2732:21
fool [1] - 2649:2
Footnote [3] - 2681:6, 2681:17, 2682:15
footnote [1] - 2683:13
footnotes [1] - 2570:24
FOR [1] - 2552:10
force [1] - 2593:10
forced [5] - 2581:25, 2623:15, 2623:25, 2624:1, 2624:5
forecast [1] - 2617:6
forecasts [3] - 2604:3, 2616:13, 2617:19
foreign [2] - 2652:14, 2653:18
foreseeable [1] - 2701:10
forgive [1] - 2633:13
form [3] - 2560:12, 2567:19, 2611:1
formal [1] - 2640:9
formally [1] - 2555:18
forth [4] - 2564:20, 2638:3, 2715:20, 2718:20
fortunately [2] - 2663:6, 2731:12
forward [17] - 2562:7, 2563:14, 2565:1, 2565:18, 2581:7, 2581:8, 2585:4, 2602:4, 2608:25, 2626:9, 2648:5, 2648:22, 2665:13, 2665:16, 2678:15, 2690:23, 2703:16
forward-looking [1] - 2626:9
fought [1] - 2595:13
four [4] - 2580:22, 2623:18, 2638:17, 2667:22
Four [1] - 2737:5
frame [2] - 2591:18, 2603:23
frankly [2] - 2603:6, 2675:17
fraud [50] - 2652:8, 2657:6, 2669:19, 2669:20, 2675:24, 2676:6, 2677:25, 2679:5, 2682:24, 2695:18, 2697:2, 2698:21, 2699:7, 2699:9, 2700:3, 2700:11, 2700:12, 2701:11, 2708:6, 2711:3, 2713:21, 2715:16, 2715:20, 2715:23, 2715:24, 2716:12, 2717:4, 2717:21, 2722:4, 2722:13, 2723:6, 2723:9, 2723:15, 2723:16, 2723:17, 2723:19, 2723:21, 2723:22, 2723:23, 2724:10, 2724:13, 2725:2, 2725:12, 2725:15, 2725:19, 2726:1, 2733:11, 2733:12, 2733:23
frauds [5] - 2723:24, 2724:6, 2724:7, 2724:23, 2724:24
fraudulent [7] - 2678:12, 2683:1, 2686:21, 2707:1, 2707:3, 2707:6, 2713:21
fraudulently [9] - 2676:8, 2677:15, 2677:18, 2678:3, 2678:15, 2687:5, 2687:6, 2687:7, 2687:12
FREDERIC [1] - 2552:11
Frederic [2] - 2554:5, 2554:6
free [4] - 2603:7, 2603:8, 2708:23, 2739:25
frequency [1] - 2627:3
freshmen [1] - 2560:17
Friday [14] - 2636:13, 2649:17, 2649:20, 2650:2, 2668:7, 2668:10, 2668:13, 2668:17, 2671:17, 2671:21, 2671:23, 2740:2, 2740:18, 2741:8
Frisolone [1] - 2553:11
front [3] - 2577:16, 2644:19, 2681:25
fry [1] - 2653:4
full [5] - 2555:25, 2633:25, 2667:17, 2671:13, 2678:5
fully [2] - 2671:7
function [1] - 2698:1
fund [68] - 2556:16, 2560:5, 2561:25, 2562:13, 2562:17, 2562:19, 2565:8, 2566:3, 2566:11, 2566:19, 2567:3, 2567:5, 2579:10, 2580:9, 2582:8, 2583:16, 2586:6, 2590:18, 2591:14, 2593:13, 2594:12, 2595:4, 2599:1, 2599:22, 2599:23, 2599:25, 2601:10, 2601:17, 2602:22, 2603:12, 2605:11, 2605:23, 2606:3, 2607:4, 2608:7, 2611:19, 2613:8, 2613:11, 2613:22, 2614:5, 2614:7, 2618:23, 2619:8, 2623:7, 2626:24, 2629:16, 2630:5, 2632:18, 2633:5, 2677:19, 2678:14, 2683:3, 2691:13, 2691:15, 2694:25, 2703:1, 2703:8, 2705:11, 2707:18, 2708:4, 2710:12, 2710:20, 2711:14, 2712:1, 2712:6, 2719:3
Fund [26] - 2562:4, 2566:24, 2566:25, 2582:19, 2601:19, 2606:25, 2608:11, 2621:15, 2622:12, 2623:11, 2623:19, 2623:23, 2628:10, 2628:17, 2628:22, 2629:25, 2694:14, 2710:22, 2710:23, 2711:1, 2712:16, 2712:17
fund's [6] - 2620:20, 2622:9, 2626:8, 2629:22, 2630:6, 2631:13
funds [144] - 2559:25, 2560:4, 2560:9, 2561:25, 2562:1, 2562:2, 2562:3, 2562:16, 2562:25, 2563:12, 2563:20, 2564:24, 2565:6, 2565:13, 2565:18, 2565:20, 2565:25, 2566:19, 2566:21, 2566:22, 2567:12, 2575:4, 2575:6, 2575:12, 2575:13, 2575:15, 2575:24, 2576:18, 2576:20, 2576:24, 2577:5, 2577:11, 2579:15, 2579:25, 2580:1, 2580:15, 2581:13, 2581:18, 2581:19, 2581:25, 2582:6, 2582:7, 2583:23, 2584:14, 2585:4, 2585:22, 2586:9, 2587:19, 2588:2, 2590:1, 2591:5, 2591:18, 2592:2, 2592:4, 2593:1, 2596:7, 2596:15, 2598:2, 2598:10, 2598:11, 2599:12, 2599:17, 2599:18, 2600:3, 2600:4, 2601:8, 2601:24, 2602:25, 2603:21, 2604:4, 2604:13, 2604:25, 2605:12, 2605:14, 2606:15, 2607:13, 2608:7, 2608:9, 2608:10, 2608:13, 2608:18, 2610:17, 2610:21, 2610:22, 2611:1, 2611:15, 2612:4, 2612:13, 2612:21, 2613:6, 2613:24, 2614:8, 2614:11, 2619:7, 2620:20, 2620:24, 2621:4, 2621:7, 2621:11, 2622:2, 2622:5, 2622:8, 2622:15, 2622:16, 2622:20, 2623:9, 2623:17,

2624:9, 2624:10, 2624:24, 2625:10, 2625:12, 2625:17, 2628:5, 2628:21, 2631:15, 2631:17, 2632:15, 2683:6, 2691:16, 2691:17, 2692:15, 2693:2, 2693:5, 2693:10, 2693:14, 2693:15, 2694:14, 2694:20, 2695:11, 2695:13, 2706:6, 2710:24, 2711:16, 2711:19, 2712:5, 2712:21, 2717:9, 2717:14, 2725:11
Funds [3] - 2572:14, 2626:21, 2626:23
furnished [3] - 2562:20, 2609:24, 2624:19
furthers [1] - 2726:24
fuss [1] - 2640:4
future [7] - 2556:20, 2565:22, 2588:16, 2594:7, 2685:9, 2697:14

G

gains [1] - 2567:15
game [3] - 2649:19, 2668:11, 2695:11
garbage [1] - 2725:15
gathered [1] - 2633:22
general [8] - 2599:16, 2604:24, 2611:11, 2611:15, 2612:11, 2613:24, 2618:16, 2667:23
generally [6] - 2593:19, 2612:13, 2614:16, 2617:24, 2718:25, 2730:24
generate [4] - 2580:15, 2580:19, 2581:13, 2582:9
generically [1] - 2562:2
GEP [1] - 2558:18
germane [1] - 2576:18
given [20] - 2560:2, 2562:8, 2564:10, 2566:3, 2566:10, 2578:3, 2594:10, 2603:18, 2603:21, 2608:21, 2609:21, 2612:3, 2619:24, 2643:11, 2673:4, 2710:16, 2715:6, 2722:16, 2729:3, 2735:9
glean [1] - 2616:17
glenn [1] - 2555:19
Glenn [1] - 2556:2
glib [1] - 2677:11
good-faith [1] - 2698:3
government [14] - 2557:15, 2558:21, 2559:12, 2561:2, 2564:14, 2564:19, 2568:11, 2568:18, 2569:12, 2569:14, 2575:7, 2575:8, 2575:21, 2576:11
Government [64] - 2552:13, 2557:10, 2636:3, 2637:21, 2638:1, 2638:6, 2639:4, 2640:11, 2641:21, 2644:17, 2644:24, 2646:8, 2646:22, 2647:5, 2648:24, 2650:10, 2652:7, 2654:5, 2654:6, 2654:9, 2654:19, 2655:3, 2655:9, 2655:18, 2658:12, 2659:8, 2667:4, 2667:14, 2667:16, 2667:22, 2675:6, 2676:11, 2676:13, 2676:19, 2681:21, 2682:15, 2683:11, 2689:19, 2690:14, 2692:7, 2692:23, 2693:25, 2695:18, 2696:1, 2698:20, 2701:8, 2702:10, 2702:24, 2703:12, 2709:25, 2710:11, 2710:14, 2715:5, 2717:24, 2718:9, 2718:11, 2718:12, 2721:17, 2727:8, 2729:11, 2733:25, 2734:4, 2740:21, 2741:5
Government's [19] - 2641:8, 2642:18, 2648:17, 2655:23, 2659:1, 2665:6, 2666:18, 2666:20, 2676:15, 2689:7, 2700:17, 2709:3, 2711:12, 2712:14, 2740:10, 2740:15, 2740:18, 2741:9, 2742:19
Governors [1] - 2559:6
Grade [18] - 2562:4, 2566:24, 2582:19, 2608:11, 2622:12, 2623:11, 2623:23, 2626:21, 2626:23, 2628:10, 2628:17, 2629:25, 2710:19, 2710:20, 2711:1, 2711:2
Grades [1] - 2605:4
graduate [2] - 2556:9, 2605:6
Graduate [1] - 2557:11
granting [1] - 2676:14
granular [1] - 2612:14
great [2] - 2624:2, 2632:23
greater [1] - 2625:23
gross [1] - 2572:3
grounds [3] - 2659:7, 2674:4, 2710:14
group [14] - 2569:8, 2570:6, 2570:7, 2570:12, 2570:13, 2571:25, 2572:2, 2572:18, 2572:24, 2573:17, 2574:2, 2575:17, 2576:2, 2604:13
growing [4] - 2727:17, 2727:18
guaranteed [1] - 2621:14
guard [1] - 2740:4
guess [18] - 2567:23, 2571:24, 2573:16, 2632:8, 2635:22, 2647:17, 2649:18, 2656:13, 2659:21, 2673:4, 2677:17, 2680:3, 2696:25, 2702:13, 2719:16, 2729:22, 2739:6, 2740:14
guidance [1] - 2696:13
guide [3] - 2669:4, 2670:11, 2670:14
guideline [3] - 2581:22, 2581:24, 2624:6
guidelines [4] - 2622:10, 2622:17, 2622:19, 2627:2
guiding [1] - 2609:3
guilty [2] - 2701:12, 2725:18
gullable [2] - 2692:5, 2692:13
gun [1] - 2740:17
guy [4] - 2601:5, 2601:7, 2602:21, 2604:17
GX [2] - 2643:17, 2643:24
GX-2 [6] - 2645:12, 2645:14, 2645:18, 2645:19, 2646:7, 2647:18

H

HACK [1] - 2552:22
Hack [1] - 2679:15
hair [2] - 2623:3, 2627:4
half [4] - 2572:9, 2588:12, 2668:20, 2738:9
hand [9] - 2555:3, 2571:16, 2577:19, 2597:5, 2639:2, 2640:24, 2650:11, 2728:6, 2730:4
handed [5] - 2644:16, 2644:19, 2645:11, 2645:14, 2645:18
handle [2] - 2606:20, 2669:24
handled [1] - 2702:17
handling [1] - 2714:21
hands [1] - 2567:22
happy [1] - 2584:4
hard [2] - 2690:19, 2738:10
harm [2] - 2645:3, 2722:25
harms [1] - 2714:9
Harvard [3] - 2557:5, 2557:10
hashing [1] - 2739:14
head [1] - 2630:17
heads [2] - 2626:11, 2739:9
health [1] - 2560:20
hear [14] - 2618:22, 2661:14, 2662:15, 2666:17, 2669:14, 2669:18, 2669:19, 2669:21, 2670:18, 2672:10, 2675:7, 2691:23, 2727:24
heard [17] - 2567:10, 2584:20, 2586:11, 2602:5, 2627:21, 2663:15, 2665:19, 2672:1, 2693:6, 2694:20, 2695:10, 2710:19, 2710:21, 2714:11, 2718:11, 2718:21
hearing [1] - 2635:3
hearsay [7] - 2639:18, 2639:19, 2641:2, 2642:1, 2642:6, 2659:10, 2659:12
heart [3] - 2703:17, 2706:5, 2720:15
hedge [71] - 2559:25, 2560:4, 2560:9, 2562:2, 2565:12, 2565:25, 2575:4, 2575:6, 2575:12, 2575:13, 2575:15, 2575:24, 2576:18, 2576:20, 2576:23, 2577:4, 2577:11, 2587:20, 2587:21, 2598:9, 2599:16, 2599:18, 2599:21, 2599:23, 2599:25, 2600:3, 2600:4, 2601:8, 2601:10, 2601:24, 2602:24, 2604:13, 2604:25, 2605:10, 2605:12, 2605:14, 2605:23, 2606:3, 2606:15, 2607:12, 2608:10, 2608:18, 2611:15, 2612:4, 2612:13, 2613:6, 2613:10, 2613:11, 2613:22, 2613:24, 2614:5, 2614:7, 2614:8, 2614:11, 2631:23, 2632:1, 2677:19, 2678:14, 2683:3, 2691:13, 2691:15, 2694:25, 2695:11, 2695:13, 2703:1, 2703:8, 2706:6, 2708:4, 2710:12, 2711:19
Hedge [1] - 2694:14
hedges [21] - 2566:18, 2567:15, 2584:24, 2585:1, 2587:2, 2618:18, 2618:23, 2619:9, 2619:11, 2624:8, 2624:12, 2624:13, 2624:20, 2624:24, 2625:14, 2625:15, 2625:24, 2631:12, 2631:15, 2631:18, 2632:7
hedging [7] - 2565:3, 2565:10, 2565:23, 2566:21, 2584:21, 2585:2, 2632:3
held [7] - 2557:6, 2566:19, 2587:13, 2610:16, 2620:24, 2624:24, 2635:2
help [3] - 2571:5, 2597:2, 2629:16
helped [1] - 2614:18
helpful [3] - 2567:24, 2720:18, 2729:15
helping [1] - 2576:15
hereby [1] - 2664:7
High [19] - 2562:4, 2566:23, 2582:19, 2605:4, 2608:10, 2622:12, 2623:11, 2623:23, 2626:21, 2626:23, 2628:10, 2628:17, 2629:25, 2710:19, 2710:20, 2711:1, 2711:2
high [6] - 2564:5, 2567:17, 2568:15, 2572:11, 2626:19, 2627:3

high-frequency [1] - 2627:3
High-Grade [14] - 2622:12, 2623:11, 2623:23, 2626:21, 2626:23, 2628:10, 2628:17, 2629:25, 2710:19, 2710:20, 2711:1, 2711:2
higher [3] - 2565:6, 2605:5, 2625:25
higher-rated [1] - 2625:25
highly [2] - 2694:25, 2695:7
himself [1] - 2660:19
hindsight [7] - 2585:19, 2586:16, 2586:21, 2589:3, 2632:24, 2691:20, 2691:24
Hindsight [2] - 2691:19, 2692:1
historically [1] - 2585:8
history [3] - 2605:25, 2606:2, 2713:24
hold [6] - 2676:2, 2677:4, 2679:18, 2688:3, 2689:8
holder [1] - 2594:13
holders [8] - 2567:5, 2567:6, 2567:7, 2586:3, 2586:14, 2593:10, 2594:15, 2599:5
holding [12] - 2614:1, 2615:20, 2687:3, 2687:17, 2688:1, 2688:2, 2690:6, 2711:12, 2711:13, 2717:15, 2717:16
holdings [2] - 2565:20, 2611:18
holds [1] - 2613:13
home [2] - 2636:8, 2648:8
honest [2] - 2728:6, 2730:7
Honor [160] - 2554:16, 2554:19, 2554:21, 2555:8, 2563:11, 2563:23, 2564:16, 2564:21, 2566:8, 2569:10, 2589:18, 2593:25, 2606:13, 2606:18, 2609:15, 2616:25, 2618:13, 2619:25, 2627:25, 2633:15, 2634:5, 2634:9, 2636:18, 2639:8, 2639:11, 2639:18, 2640:8, 2640:17, 2641:2, 2641:9, 2641:12, 2642:8, 2642:9, 2642:11, 2642:23, 2643:3, 2643:16, 2643:18, 2644:6, 2644:12, 2645:6, 2645:10, 2645:18, 2645:22, 2646:3, 2646:6, 2646:21, 2647:15, 2648:25, 2649:24, 2652:9, 2653:8, 2654:13, 2654:20, 2655:5, 2655:22, 2656:7, 2656:12, 2657:2, 2658:24, 2659:11, 2660:7, 2661:3, 2661:12, 2661:17, 2662:6, 2662:17, 2663:15, 2665:11, 2668:5, 2673:10, 2673:24, 2674:16, 2674:17, 2675:18, 2676:12, 2676:25, 2677:8, 2678:7, 2678:17, 2679:7, 2680:15, 2680:22, 2685:5, 2685:14, 2686:19, 2687:10, 2687:24, 2689:16, 2690:4, 2690:9, 2691:22, 2692:24, 2693:13, 2693:20, 2694:6, 2694:12, 2695:24, 2696:8, 2697:20, 2698:7, 2701:18, 2702:22, 2704:8, 2704:22, 2704:25, 2705:11, 2706:8, 2706:13, 2707:13, 2708:5, 2708:8, 2709:4, 2709:20, 2710:13, 2710:15, 2711:11, 2712:24, 2713:6, 2713:11, 2713:17, 2714:2, 2714:4, 2714:8, 2714:11, 2714:16, 2715:2, 2715:16, 2716:19, 2716:20, 2717:23, 2718:21, 2720:4, 2721:6, 2721:9, 2721:10, 2721:24, 2722:8, 2723:13, 2723:17, 2726:4, 2726:9, 2727:4, 2727:13, 2727:19, 2728:4, 2731:5, 2731:8, 2733:3, 2734:11, 2735:3, 2735:6, 2736:8, 2736:16, 2736:21, 2736:22, 2736:23, 2737:3, 2738:3, 2741:12
Honor's [3] - 2664:5, 2680:7, 2718:12
Honorable [2] - 2554:5, 2554:6
HONORABLE [1] - 2552:11
hope [1] - 2660:16
hopefully [8] - 2574:16, 2666:6, 2667:24, 2668:18, 2671:15, 2738:17, 2740:10, 2740:16
hour [9] - 2569:2, 2569:3, 2569:25, 2571:23, 2571:24, 2572:21, 2667:19, 2668:20, 2738:11
hours [9] - 2569:4, 2570:3, 2573:15, 2574:6, 2574:12, 2574:15, 2649:9, 2649:10, 2667:22
House [1] - 2557:19
house [10] - 2565:22, 2565:25, 2585:10, 2585:15, 2586:24, 2586:25, 2587:7, 2588:4, 2588:7, 2597:18
houses [3] - 2585:9, 2588:16, 2597:19
housing [14] - 2587:3, 2587:5, 2587:13, 2597:12, 2600:18, 2617:6, 2617:18, 2617:19, 2624:12, 2625:4, 2625:5, 2625:8, 2625:16
Howard [1] - 2602:20
Hubbard [18] - 2555:4, 2555:10, 2555:19, 2556:2, 2560:25, 2561:6, 2568:17, 2569:17, 2569:23, 2571:12, 2575:2, 2576:21, 2577:22, 2579:22, 2589:22, 2633:18, 2693:6, 2703:8
hundred [8] - 2560:15, 2566:23, 2566:24, 2572:21, 2623:8, 2638:14, 2638:25, 2725:17
hundreds [1] - 2573:14
hypothetical [1] - 2721:6
hypothetically [2] - 2578:11, 2682:25

I

idea [9] - 2570:10, 2573:1, 2573:5, 2573:25, 2574:4, 2618:11, 2622:24, 2696:7, 2696:23
identified [2] - 2674:22, 2710:1
identifies [1] - 2714:9
identify [3] - 2648:2, 2661:13, 2696:6
ignored [1] - 2674:1
ILENE [1] - 2552:17
Ilene [1] - 2554:14
Illinois [1] - 2557:9
image [1] - 2556:15
imagine [2] - 2657:18, 2721:21
impact [2] - 2600:19, 2712:6
impacted [1] - 2581:18
implications [1] - 2560:6
implied [1] - 2681:12
imploded [1] - 2618:24
important [10] - 2567:1, 2615:4, 2643:4, 2670:1, 2671:4, 2671:10, 2672:1, 2674:3, 2729:4, 2739:21
in-house [1] - 2565:25
inaccurate [1] - 2730:8
inadequate [5] - 2717:9, 2717:11, 2717:12, 2717:13, 2717:15
inadvertently [2] - 2650:19, 2674:14
inapplicable [1] - 2681:14
inappropriate [1] - 2701:22
Inc [1] - 2681:17
inclination [1] - 2686:8
inclined [2] - 2689:18, 2698:4
include [2] - 2626:9, 2717:4
included [5] - 2638:7, 2715:6, 2717:5, 2727:8, 2731:3
including [3] - 2567:21, 2567:24, 2698:21
inclusion [2] - 2708:7, 2713:18
income [2] - 2605:9, 2605:19
incomplete [1] - 2705:4
inconsistent [3] - 2693:24, 2723:6, 2724:16
incorporate [3] - 2673:18, 2729:1, 2737:13
incorporating [1] - 2739:13
incorrect [1] - 2593:18
increase [1] - 2732:23
increased [1] - 2623:4
increasing [1] - 2588:24
incur [2] - 2582:10, 2582:11
indeed [7] - 2566:7, 2566:9, 2572:16, 2582:21, 2595:1, 2619:10, 2623:13
independent [1] - 2732:3
index [3] - 2565:23, 2585:9, 2587:24
INDEX [1] - 2742:1
indexes [1] - 2588:3
indicate [1] - 2623:15
indicated [1] - 2713:13
indicates [1] - 2627:9
indication [1] - 2677:12
indictment [8] - 2590:9, 2590:12, 2590:21, 2591:2, 2698:25, 2721:16, 2723:18, 2724:17
individual [12] - 2584:22, 2587:22, 2603:5, 2605:14, 2607:21, 2611:13, 2613:13, 2613:21, 2617:22, 2624:3, 2705:10, 2705:20
individuals [3] - 2714:17, 2714:22, 2715:4
induce [1] - 2676:16
induced [13] - 2677:16, 2677:18, 2678:2, 2678:16, 2687:4, 2687:5, 2687:8, 2687:13, 2687:15, 2687:16, 2687:17, 2689:1, 2710:22
inducement [2] - 2678:12, 2678:23
industries [1] - 2559:13
infer [2] - 2594:17, 2605:24
inference [1] - 2624:18
inferring [1] - 2627:15
inflation [1] - 2558:18
inform [1] - 2649:12
information [67] - 2562:13, 2562:15, 2566:3, 2566:4, 2566:5, 2578:7, 2578:9, 2578:12, 2578:13, 2578:19, 2578:22, 2578:23, 2579:1, 2580:21, 2581:4, 2589:2, 2590:3, 2591:23, 2601:4, 2601:6, 2603:18, 2608:21, 2609:1, 2610:12, 2610:22, 2610:25, 2611:5, 2611:15, 2611:18, 2611:20, 2612:2, 2612:14, 2612:20, 2613:1, 2613:3, 2614:4, 2614:24, 2616:5,

2616:9, 2616:10, 2616:15, 2617:3, 2617:4, 2617:9, 2617:11, 2624:3, 2630:15, 2630:24, 2631:6, 2702:6, 2702:23, 2703:1, 2703:2, 2703:3, 2703:7, 2703:9, 2703:11, 2704:15, 2705:24, 2707:14, 2707:25, 2708:1, 2708:2, 2718:17, 2739:22
infuse [1] - 2598:11
infused [1] - 2596:15
initial [3] - 2678:6, 2696:22, 2705:8
injected [1] - 2736:4
innocence [1] - 2669:10
inquire [2] - 2561:2, 2619:24
inquiry [2] - 2560:9, 2569:11
insider [12] - 2669:19, 2698:17, 2702:4, 2703:12, 2704:14, 2707:12, 2707:14, 2708:9, 2727:23, 2736:12, 2737:2, 2737:6
insiders [2] - 2736:16, 2737:8
insight [1] - 2614:17
insofar [1] - 2596:23
instance [9] - 2568:2, 2570:15, 2572:13, 2578:11, 2605:11, 2676:20, 2699:10, 2718:3, 2725:7
instances [1] - 2608:13
instead [2] - 2617:15, 2624:13
instincts [1] - 2681:20
institutional [1] - 2608:13
institutions [1] - 2600:19
instruct [7] - 2666:6, 2667:13, 2668:19, 2695:7, 2705:9, 2714:5, 2732:22
instructed [3] - 2668:22, 2715:15, 2737:1
instructing [1] - 2732:20
instruction [18] - 2675:1, 2675:3, 2675:10, 2675:16, 2697:1, 2705:8, 2713:2, 2714:20, 2714:21, 2717:25, 2728:10, 2728:19, 2729:2, 2731:16, 2732:11, 2732:18, 2732:19, 2737:16
Instruction [7] - 2675:3, 2694:12, 2694:20, 2729:1, 2729:8, 2729:16, 2730:21
instructions [14] - 2665:22, 2669:3, 2669:6, 2669:15, 2675:19, 2693:16, 2717:5, 2726:22, 2731:9, 2734:21, 2734:22, 2734:25, 2737:15, 2738:5
instrument [1] - 2565:9
instruments [2] - 2565:8, 2714:10
insufficient [1] - 2732:24
insurance [3] - 2576:10, 2576:12, 2576:14
intangibles [1] - 2607:11
intelligently [1] - 2666:6
intended [1] - 2692:13
intent [12] - 2717:2, 2721:12, 2721:14, 2721:18, 2729:2, 2729:17, 2732:22, 2732:25, 2734:1, 2734:2, 2734:8, 2737:19
intention [3] - 2713:4, 2732:10, 2732:18
interest [10] - 2559:9, 2559:14, 2562:3, 2567:5, 2586:3, 2627:13, 2628:16, 2628:25, 2657:6, 2678:13
interesting [3] - 2648:10, 2680:12, 2690:2
interests [3] - 2677:16, 2704:1, 2727:10
interfere [1] - 2671:12
interim [1] - 2637:21
internal [8] - 2562:18, 2622:9, 2622:16, 2622:18, 2624:6, 2627:1, 2629:22, 2719:3
Internal [1] - 2559:1
International [1] - 2558:25
Internet [1] - 2672:4
interrupt [1] - 2561:12
interrupting [1] - 2606:1
interstate [2] - 2656:15, 2736:2
intrastate [1] - 2657:6
introduced [1] - 2646:8
intuition [1] - 2689:23
intuitive [1] - 2689:19
invest [5] - 2683:5, 2693:2, 2693:5, 2693:10, 2695:13
investable [1] - 2693:21
invested [1] - 2610:21
investigate [1] - 2578:5
Investigation [1] - 2553:8
investing [7] - 2603:1, 2607:15, 2610:17, 2611:1, 2613:11, 2615:13, 2617:24
Investment [1] - 2577:12
investment [7] - 2600:8, 2603:8, 2605:4, 2608:17, 2691:16, 2717:8, 2717:14
investments [7] - 2587:20, 2607:10, 2677:22, 2689:6, 2694:22, 2694:23, 2717:10
investor [36] - 2584:16, 2592:15, 2599:12, 2602:22, 2602:24, 2603:3, 2603:13, 2604:20, 2604:25, 2605:8, 2605:13, 2606:3, 2606:5, 2606:25, 2607:1, 2607:3, 2612:3, 2612:16, 2612:17, 2612:18, 2613:12, 2613:13, 2615:10, 2693:18, 2693:22, 2693:25, 2694:13, 2694:25, 2695:4, 2695:8, 2710:19, 2710:21, 2711:2, 2722:4, 2722:13
investor's [3] - 2607:8, 2607:10, 2607:17
investors [85] - 2563:1, 2563:20, 2566:11, 2566:23, 2567:6, 2579:25, 2586:3, 2590:22, 2591:4, 2591:7, 2591:13, 2591:17, 2591:21, 2592:8, 2593:2, 2593:13, 2594:3, 2594:7, 2595:7, 2599:21, 2599:24, 2600:3, 2600:5, 2601:8, 2601:14, 2601:16, 2601:19, 2601:24, 2603:12, 2604:5, 2604:12, 2604:13, 2604:22, 2605:3, 2605:14, 2605:17, 2606:6, 2606:12, 2606:15, 2606:16, 2607:10, 2607:19, 2607:20, 2607:21, 2607:22, 2607:24, 2608:1, 2608:10, 2608:16, 2610:14, 2611:2, 2611:4, 2612:4, 2612:14, 2612:21, 2613:10, 2614:7, 2615:6, 2615:13, 2626:25, 2628:16, 2631:5, 2676:16, 2677:18, 2678:15, 2685:24, 2692:6, 2692:8, 2692:9, 2692:14, 2692:15, 2693:14, 2694:21, 2694:22, 2699:12, 2705:10, 2705:20, 2708:11, 2712:6, 2718:15, 2718:17, 2718:19, 2719:1, 2721:15, 2721:18
investors' [1] - 2592:19
involve [1] - 2575:12
involved [4] - 2629:12, 2638:2, 2715:4, 2733:1
involves [3] - 2574:7, 2681:7, 2704:16
ironed [1] - 2635:25
issue [50] - 2555:5, 2575:15, 2588:5, 2588:6, 2618:6, 2618:10, 2618:11, 2622:15, 2623:23, 2640:11, 2642:11, 2643:25, 2647:3, 2654:21, 2657:25, 2658:1, 2658:16, 2658:17, 2675:12, 2678:5, 2679:3, 2679:22, 2680:2, 2680:8, 2682:16, 2684:8, 2684:18, 2684:19, 2685:16, 2691:2, 2691:3, 2691:12, 2694:15, 2695:1, 2695:2, 2696:25, 2697:21, 2698:17, 2699:21, 2701:24, 2701:25, 2702:9, 2711:13, 2711:14, 2714:9, 2717:15, 2717:16, 2719:8, 2724:21, 2732:11
issued [1] - 2621:13
issues [16] - 2559:21, 2564:4, 2589:11, 2635:24, 2636:2, 2642:2, 2646:25, 2666:5, 2671:8, 2673:7, 2678:22, 2678:23, 2682:3, 2706:24, 2729:14, 2739:8
item [2] - 2644:15, 2739:15
items [4] - 2718:25, 2719:2, 2733:3, 2733:4
iterations [1] - 2558:9
itself [2] - 2589:12, 2682:15

J

J.P [2] - 2646:24, 2664:9
James [1] - 2554:13
JAMES [1] - 2552:16
January [5] - 2563:15, 2566:2, 2583:8, 2603:19, 2630:4
JAROLAW [1] - 2552:17
JAROSLAW [6] - 2648:21, 2648:25, 2649:2, 2649:8, 2649:11, 2649:25
Jaroslaw [5] - 2554:14, 2666:19, 2667:21, 2709:6, 2740:9
Jersey [8] - 2652:18, 2652:19, 2652:25, 2653:10, 2656:22, 2664:16, 2664:19, 2664:23
Jim [1] - 2569:19
job [6] - 2557:22, 2588:25, 2595:10, 2661:10, 2671:13, 2735:20
joins [1] - 2737:12
joint [3] - 2660:4, 2663:14, 2665:4
jot [1] - 2739:6
JUDGE [1] - 2552:11
judge [7] - 2564:22, 2567:21, 2567:25, 2568:13, 2577:19, 2667:1, 2683:7
Judge [8] - 2577:21, 2592:2, 2659:18, 2680:20, 2682:1, 2690:3, 2720:8
judge's [1] - 2665:22
judgement [2] - 2594:9, 2594:21
judges [1] - 2738:9
judgment [2] - 2622:4, 2690:17
July [3] - 2598:19, 2632:8, 2721:1
June [6] - 2586:7, 2593:1, 2598:19,

2601:14, 2601:18, 2720:23
jurisdictional [3] - 2654:1, 2654:21, 2657:6
jurors [20] - 2562:10, 2568:7, 2585:7, 2589:6, 2613:9, 2620:9, 2635:10, 2636:6, 2636:16, 2640:7, 2648:6, 2650:2, 2650:11, 2657:21, 2661:13, 2667:1, 2669:12, 2671:13, 2711:6, 2740:7
JURY [1] - 2552:10
jury [75] - 2554:7, 2555:1, 2555:2, 2555:9, 2556:24, 2558:11, 2558:24, 2560:2, 2564:17, 2568:3, 2568:17, 2584:11, 2587:11, 2588:14, 2589:14, 2597:2, 2620:2, 2625:7, 2626:1, 2627:21, 2635:4, 2648:3, 2649:15, 2652:6, 2655:23, 2655:25, 2658:21, 2660:9, 2663:19, 2665:18, 2668:24, 2670:22, 2672:9, 2672:11, 2682:4, 2691:6, 2692:7, 2692:19, 2694:7, 2694:17, 2695:4, 2695:5, 2695:20, 2698:22, 2699:10, 2705:3, 2705:9, 2708:13, 2710:16, 2710:17, 2714:1, 2714:3, 2715:14, 2715:20, 2715:22, 2719:18, 2719:23, 2721:1, 2721:21, 2724:4, 2724:11, 2725:9, 2725:14, 2725:18, 2730:24, 2731:16, 2732:5, 2732:13, 2732:20, 2734:21, 2734:22, 2735:13, 2737:1, 2737:16, 2738:5
Jury [9] - 2552:11, 2555:11, 2620:5, 2620:13, 2637:8, 2660:13, 2672:16, 2675:2, 2729:7
jury's [2] - 2719:12, 2730:25
justify [1] - 2698:5

K

KEELEY [110] - 2552:22, 2638:13, 2638:23, 2639:1, 2639:4, 2639:11, 2639:23, 2640:8, 2644:6, 2644:12, 2644:16, 2644:24, 2645:10, 2645:14, 2645:17, 2645:21, 2646:3, 2646:6, 2646:21, 2647:21, 2660:7, 2662:23, 2673:10, 2673:18, 2674:3, 2674:6, 2674:17, 2692:17, 2692:24, 2693:4, 2693:13, 2693:20, 2693:23, 2694:2, 2694:6, 2697:20, 2698:7, 2698:9, 2709:20, 2709:24, 2710:8, 2711:11, 2711:17, 2712:13, 2712:24, 2713:3, 2713:6, 2713:10, 2713:17, 2713:20, 2714:2, 2714:16, 2714:20, 2715:2, 2715:11, 2715:14, 2715:18, 2715:24, 2716:5, 2716:19, 2717:3, 2717:13, 2717:18, 2717:20, 2717:22, 2718:3, 2718:5, 2718:10, 2721:9, 2721:11, 2721:14, 2721:23, 2722:1, 2722:8, 2722:16, 2722:23, 2723:4, 2723:11, 2723:13, 2725:24, 2726:4, 2726:9, 2726:18, 2726:21, 2727:1, 2727:4, 2727:13, 2727:19, 2727:22, 2728:1, 2731:5, 2731:8, 2732:10, 2733:3, 2733:5, 2733:10, 2733:14, 2733:16, 2733:22, 2734:24, 2735:3, 2735:6, 2735:12, 2736:7, 2736:22, 2738:3, 2738:24, 2739:12, 2739:19, 2741:11
Keeley [4] - 2554:17, 2638:22, 2640:12, 2728:18
keep [9] - 2574:16, 2618:6, 2671:18, 2672:5, 2672:6, 2689:10, 2730:11, 2740:7
keeping [2] - 2583:9, 2694:17
keeps [1] - 2727:17
Kennedy [1] - 2557:10
kept [1] - 2730:6
key [2] - 2558:15, 2690:3
Kim [1] - 2664:9
kind [3] - 2577:19, 2612:14, 2623:15
kinds [2] - 2621:7, 2621:10
Klaus [1] - 2602:20
KLIO [1] - 2621:18
knowing [4] - 2610:19, 2633:24, 2717:1, 2732:18
knowledge [3] - 2569:22, 2612:9, 2664:11
known [8] - 2566:5, 2585:16, 2585:21, 2591:21, 2611:19, 2617:23, 2617:24, 2632:22
Korman [1] - 2720:8

L

lack [3] - 2627:13, 2630:1, 2688:10
lad [1] - 2708:1
laid [1] - 2606:7
landscape [1] - 2686:6
language [29] - 2567:22, 2676:5, 2679:8, 2680:25, 2686:5, 2686:12, 2690:16, 2692:11, 2710:4, 2712:23, 2713:2, 2713:18, 2717:5, 2717:25, 2722:1, 2722:12, 2722:18, 2724:2, 2724:17, 2726:11, 2726:21, 2727:7, 2730:13, 2730:16, 2730:17, 2730:21, 2734:14, 2736:5
lap [1] - 2668:13
lapping [1] - 2668:7
large [10] - 2562:12, 2566:22, 2575:19, 2576:13, 2585:20, 2600:19, 2601:15, 2627:4, 2636:13, 2720:13
largess [1] - 2627:24
last [17] - 2563:25, 2599:5, 2639:23, 2645:8, 2647:19, 2647:23, 2649:16, 2669:23, 2692:4, 2709:16, 2726:11, 2727:2, 2727:20, 2733:3, 2733:4, 2733:15, 2740:21
late [8] - 2629:15, 2726:11, 2727:20, 2729:6, 2738:18, 2740:7, 2740:8, 2741:3
Latin [2] - 2581:1, 2581:3
latitude [4] - 2568:14, 2568:20, 2619:25, 2627:23
latter [1] - 2624:17
laude [1] - 2557:2
laundry [2] - 2673:13, 2674:14
lAURIE [1] - 2553:6
Laurie [2] - 2674:12, 2679:16
law [46] - 2593:24, 2617:15, 2638:10, 2652:20, 2655:11, 2665:22, 2666:7, 2668:19, 2669:9, 2669:14, 2669:17, 2670:8, 2671:1, 2677:2, 2677:10, 2679:21, 2679:23, 2682:3, 2682:18, 2684:9, 2686:1, 2688:23, 2689:20, 2689:24, 2690:6, 2691:8, 2692:22, 2693:9, 2695:23, 2696:10, 2697:11, 2697:21, 2698:1, 2704:21, 2707:15, 2707:23, 2708:5, 2709:18, 2714:10, 2716:25, 2718:7, 2731:20, 2732:24, 2734:11, 2737:2
law-related [1] - 2698:1
laws [2] - 2689:14, 2690:5
lawyering [1] - 2700:7
lawyers [5] - 2574:19, 2589:13, 2667:1, 2668:22, 2700:4
lay [4] - 2567:24, 2584:11, 2686:6, 2694:14
lead [2] - 2594:11, 2645:5
learn [3] - 2588:15, 2606:24, 2612:22
learned [1] - 2588:19
least [5] - 2600:7, 2627:11, 2685:3, 2694:22, 2738:25
leave [2] - 2731:1, 2740:18
leaves [1] - 2620:6
leaving [1] - 2724:7
left [5] - 2569:23, 2647:13, 2668:8, 2697:2, 2715:22
legal [8] - 2605:25, 2606:2, 2615:15, 2666:5, 2666:8, 2666:9, 2679:3, 2719:23
lend [2] - 2588:12, 2594:15
lender [2] - 2586:5, 2588:12
lenders [13] - 2567:2, 2567:9, 2567:16, 2586:7, 2586:8, 2586:13, 2588:9, 2590:5, 2596:17, 2597:6, 2598:2, 2599:13, 2627:3
lending [7] - 2585:24, 2596:17, 2598:13, 2598:15, 2598:22, 2599:4, 2628:18
lends [1] - 2700:6
lengthy [2] - 2570:21, 2667:11
lens [3] - 2585:19, 2586:20, 2589:3
Leslie [2] - 2654:23, 2655:14
less [4] - 2585:13, 2585:14, 2606:20, 2667:20
lessons [2] - 2588:15, 2588:19
letter [4] - 2652:7, 2654:5, 2657:9, 2689:25
level [8] - 2564:5, 2567:17, 2568:15, 2576:22, 2581:24, 2605:15, 2605:16, 2626:4
levels [1] - 2581:22
Leverage [3] - 2621:15, 2623:19, 2628:22
leverage [8] - 2565:5, 2565:7, 2567:10, 2588:10, 2588:11, 2607:1, 2607:4, 2607:5
Leveraged [2] - 2562:4, 2566:25
leveraged [4] - 2565:3, 2584:16, 2585:22, 2598:11
liability [1] - 2695:22
lib [1] - 2670:11
lie [2] - 2689:20, 2711:23
lied [2] - 2689:4, 2711:20
lies [1] - 2703:18
Life [1] - 2587:13
life [1] - 2621:12
light [1] - 2664:5
lights [4] - 2622:11, 2623:14, 2623:20,

2629:21
likely [2] - 2580:24, 2608:25
likewise [5] - 2558:18, 2665:11, 2673:24, 2674:11, 2717:9
limit [1] - 2654:2
limited [3] - 2578:7, 2681:11, 2681:21
limiting [3] - 2674:25, 2675:3, 2675:10
limits [2] - 2604:23, 2740:1
Line [4] - 2704:9, 2713:9, 2730:3, 2736:12
line [8] - 2572:7, 2589:20, 2599:5, 2617:13, 2617:17, 2735:24, 2736:6, 2736:11
liner [1] - 2640:4
lines [7] - 2592:23, 2713:10, 2722:9, 2728:5, 2728:20, 2733:10, 2733:16
links [1] - 2559:21
liquid [2] - 2594:24, 2594:25
liquidate [1] - 2581:25
liquidated [1] - 2582:10
liquidity [19] - 2562:19, 2564:4, 2603:3, 2621:24, 2622:3, 2622:4, 2622:8, 2622:12, 2622:13, 2622:17, 2622:19, 2623:6, 2623:8, 2623:10, 2623:23, 2627:1, 2628:24, 2629:20, 2630:1
Liquidity [1] - 2628:17
list [9] - 2577:22, 2650:8, 2650:10, 2650:15, 2665:3, 2668:25, 2673:13, 2674:14, 2736:4
listed [2] - 2665:4, 2716:1
listen [3] - 2665:20, 2665:22, 2672:9
listening [2] - 2660:20, 2666:9
listens [1] - 2670:2
litigation [1] - 2578:20
live [4] - 2575:15, 2594:14, 2610:4, 2690:16
LLP [2] - 2552:19, 2553:2
loans [1] - 2621:8
loathe [1] - 2738:19
location [1] - 2571:6
logged [1] - 2729:13
look [39] - 2565:20, 2577:15, 2584:14, 2586:20, 2594:6, 2597:16, 2597:18, 2607:19, 2607:21, 2610:23, 2617:9, 2617:10, 2622:25, 2624:4, 2638:8, 2643:12, 2643:20, 2644:13, 2644:14, 2644:17, 2649:4, 2655:1, 2655:10, 2658:19, 2660:5, 2670:21, 2672:3, 2678:19, 2681:15, 2690:23, 2696:9, 2708:14, 2713:25, 2727:18, 2729:15, 2730:17, 2730:20, 2735:5, 2735:19
looked [9] - 2566:17, 2597:18, 2633:2, 2644:20, 2675:2, 2675:9, 2678:18, 2696:15, 2729:5
looking [23] - 2581:7, 2581:8, 2586:16, 2593:7, 2603:15, 2607:25, 2609:2, 2609:4, 2609:7, 2610:22, 2610:24, 2626:3, 2626:9, 2652:12, 2665:12, 2665:15, 2670:23, 2673:12, 2675:8, 2685:20, 2704:12, 2713:8, 2722:8
looks [1] - 2595:4
lose [2] - 2584:19, 2728:7
losses [6] - 2582:10, 2582:11, 2606:15, 2606:21, 2607:8, 2607:16
LOTO [1] - 2605:10
lottery [1] - 2695:12
lower [3] - 2607:16, 2621:4, 2625:24
lulled [1] - 2685:25
lunch [11] - 2635:10, 2635:19, 2636:16, 2637:4, 2644:14, 2644:17, 2647:14, 2660:16, 2660:22, 2740:10
Luncheon [1] - 2650:25
luncheon [1] - 2640:14
lunchtime [5] - 2638:4, 2638:11, 2643:21, 2644:1, 2644:3
luxury [3] - 2678:20, 2686:6, 2733:6
lying [1] - 2685:24

M

ma'am [1] - 2620:22
machine [1] - 2736:4
magnified [1] - 2585:14
Mail [1] - 2643:4
mail [32] - 2553:13, 2579:12, 2579:14, 2579:17, 2579:19, 2627:11, 2627:16, 2628:20, 2633:11, 2642:22, 2643:3, 2643:11, 2643:16, 2643:23, 2644:18, 2645:11, 2645:17, 2646:15, 2652:13, 2656:14, 2659:3, 2659:5, 2661:16, 2662:3, 2662:4, 2664:8, 2664:12, 2664:14, 2664:21, 2725:3, 2725:9, 2739:6
Mailine [1] - 2646:16
mails [19] - 2579:6, 2579:9, 2627:8, 2628:10, 2628:12, 2628:15, 2633:2, 2633:10, 2633:18, 2633:21, 2640:23, 2652:17, 2663:2, 2663:3, 2664:16, 2736:3, 2736:9
main [3] - 2705:6, 2708:6, 2708:9
maintain [1] - 2732:23
majority [1] - 2616:4
manage [1] - 2671:22
managed [5] - 2562:25, 2563:12, 2564:25, 2580:1, 2694:23
management [4] - 2556:14, 2564:4, 2594:10, 2629:23
Management [1] - 2664:18
manager [13] - 2594:21, 2613:1, 2613:11, 2615:2, 2615:12, 2616:19, 2617:10, 2617:23, 2633:4, 2722:22, 2722:24, 2737:2, 2737:6
managers [21] - 2581:11, 2586:2, 2598:10, 2611:21, 2612:10, 2612:21, 2612:25, 2613:4, 2613:24, 2614:5, 2615:1, 2617:7, 2618:7, 2626:11, 2629:1, 2630:11, 2630:17, 2705:22, 2736:15, 2736:19, 2737:7
mandate [3] - 2603:8, 2603:9, 2603:10
manifests [1] - 2685:3
Manor [1] - 2681:9
map [1] - 2671:15
March [13] - 2563:15, 2566:2, 2579:10, 2585:2, 2585:17, 2588:8, 2624:14, 2625:1, 2626:22, 2627:8, 2628:5, 2628:10, 2629:11
Margaret [1] - 2554:17
mARGARET [1] - 2552:22
margin [2] - 2627:5, 2733:14
markdown [1] - 2594:11
marked [10] - 2658:22, 2661:7, 2661:22, 2662:7, 2663:7, 2742:23, 2742:25, 2743:2, 2743:4, 2743:6
Market [1] - 2560:8
market [30] - 2558:7, 2558:18, 2560:10, 2566:5, 2579:18, 2581:17, 2584:25, 2585:16, 2585:20, 2587:4, 2587:13, 2594:10, 2594:23, 2595:4, 2595:19, 2597:12, 2599:7, 2600:18, 2604:5, 2614:16, 2616:8, 2616:13, 2617:18, 2624:3, 2624:5, 2625:1, 2625:20, 2626:14
marketing [5] - 2639:12, 2644:18, 2644:20, 2661:18, 2661:19
marketplace [1] - 2630:12
markets [15] - 2560:19, 2565:11, 2576:3, 2576:10, 2586:11, 2600:23, 2600:25, 2604:8, 2604:10, 2605:16, 2609:8, 2610:25, 2611:3, 2626:18
Markit [2] - 2617:5, 2625:13
MARKIT [1] - 2617:6
MARYANN [1] - 2553:6
Masters [1] - 2557:4
material [20] - 2609:24, 2683:2, 2691:6, 2702:5, 2704:15, 2706:19, 2707:3, 2716:4, 2716:21, 2717:8, 2717:12, 2717:14, 2719:6, 2719:13, 2719:14, 2719:15, 2720:6, 2731:20, 2732:1, 2732:15
materiality [14] - 2679:24, 2680:2, 2680:24, 2691:4, 2691:12, 2692:4, 2715:15, 2715:18, 2715:25, 2716:6, 2716:10, 2716:13, 2719:8, 2737:20
materialize [1] - 2584:2
materials [1] - 2562:20
matter [11] - 2569:5, 2570:14, 2570:15, 2572:4, 2596:22, 2692:12, 2707:22, 2731:20, 2732:24, 2733:17, 2737:2
mattered [1] - 2591:21
matters [7] - 2559:6, 2575:4, 2629:16, 2666:8, 2674:22, 2695:2, 2735:18
Matthew [4] - 2553:3, 2554:9, 2554:24, 2664:22
MATTHEW [1] - 2552:7
maximize [1] - 2586:2
maximizing [1] - 2567:5
MBA [1] - 2556:21
McGarrigal's [1] - 2715:7
MCGOVERN [69] - 2552:16, 2554:12, 2613:17, 2614:21, 2616:2, 2618:2, 2618:4, 2619:13, 2619:19, 2627:17, 2634:3, 2636:5, 2639:8, 2648:19, 2649:21, 2650:24, 2652:9, 2652:17, 2653:8, 2653:14, 2653:17, 2653:21, 2654:13, 2654:23, 2655:2, 2655:5, 2656:3, 2656:20, 2656:25, 2657:2, 2657:16, 2657:20, 2660:10, 2663:14, 2663:18, 2664:7, 2665:2, 2665:15, 2675:8, 2678:17, 2678:21, 2696:8, 2696:13, 2696:19, 2697:15, 2698:24, 2699:4, 2699:10, 2709:4, 2709:9, 2709:12, 2714:8, 2721:19, 2723:21, 2724:2, 2724:14, 2724:24, 2725:6, 2725:14, 2725:21, 2726:5, 2731:21, 2731:24, 2734:7, 2734:10, 2740:11,

2740:24, 2741:1, 2741:12
McGovern [22] - 2554:13, 2561:3, 2569:13, 2569:16, 2569:19, 2577:21, 2589:18, 2589:19, 2596:1, 2606:18, 2609:15, 2610:9, 2629:4, 2629:6, 2657:12, 2660:3, 2663:13, 2667:15, 2668:10, 2695:12, 2742:10, 2742:14
mean [29] - 2558:12, 2565:4, 2567:25, 2571:4, 2580:20, 2583:16, 2583:22, 2592:22, 2595:18, 2597:23, 2604:2, 2613:4, 2617:14, 2619:21, 2622:9, 2624:8, 2637:15, 2648:13, 2689:10, 2691:25, 2703:10, 2704:3, 2712:3, 2716:12, 2718:7, 2719:16, 2719:22, 2731:25, 2741:4
meaning [1] - 2558:13
means [19] - 2565:19, 2586:9, 2589:23, 2593:9, 2593:16, 2594:1, 2594:9, 2594:21, 2607:3, 2607:7, 2613:22, 2626:15, 2660:19, 2665:18, 2666:25, 2667:25, 2708:23, 2730:14, 2730:22
meant [3] - 2563:7, 2578:3, 2624:10
meantime [1] - 2648:1
meet [7] - 2570:17, 2594:10, 2596:18, 2623:8, 2630:1, 2642:6, 2727:9
meeting [1] - 2624:6
meetings [2] - 2574:13, 2574:14
member [1] - 2701:9
members [4] - 2617:24, 2620:2, 2665:18, 2686:17
memoranda [1] - 2657:9
memorandum [2] - 2673:19, 2708:10
mention [5] - 2590:13, 2592:6, 2667:23, 2679:10, 2720:24
mentioned [6] - 2560:11, 2626:21, 2637:2, 2646:17, 2667:6, 2669:14
mentions [1] - 2723:6
merchandise [1] - 2600:5
mere [1] - 2704:2
mesh [1] - 2710:24
message [1] - 2699:12
met [6] - 2574:19, 2591:22, 2594:23, 2622:16, 2627:5, 2727:9
methods [3] - 2624:16, 2695:17, 2695:21
might [33] - 2569:23, 2574:2, 2583:2, 2583:6, 2583:10, 2587:21, 2590:1, 2590:7, 2590:18, 2595:21, 2600:11, 2602:25, 2603:5, 2603:12, 2603:16, 2603:17, 2612:19, 2612:25, 2613:15, 2614:11, 2614:14, 2615:16, 2632:3, 2633:5, 2637:22, 2681:25, 2691:15, 2696:16, 2699:13, 2728:1, 2738:24
million [10] - 2566:23, 2566:24, 2599:2, 2601:20, 2605:1, 2683:5, 2694:22, 2694:23, 2720:22, 2725:17
Milwaukee [1] - 2600:21
mincing [1] - 2583:25
mind [13] - 2565:25, 2583:9, 2603:12, 2633:9, 2640:23, 2641:13, 2641:15, 2642:2, 2643:5, 2643:7, 2646:14, 2672:6, 2723:9
mindful [2] - 2690:14, 2740:4
mine [1] - 2577:18
minimal [1] - 2605:4
ministerial [1] - 2636:1
minutes [4] - 2597:9, 2635:6, 2637:13, 2667:19
mischaracterized [1] - 2594:18
mischaracterizes [1] - 2619:2
misleading [4] - 2591:6, 2706:24, 2718:6, 2718:8
misled [2] - 2590:22, 2694:8
mismatched [1] - 2626:4
mispriced [1] - 2626:16
misrepresentation [13] - 2683:21, 2684:7, 2688:17, 2699:13, 2710:19, 2710:22, 2711:9, 2712:15, 2717:12, 2718:6, 2719:13, 2719:14, 2720:23
misrepresentations [9] - 2678:16, 2683:1, 2685:13, 2688:21, 2689:10, 2710:25, 2712:5, 2717:6
misrepresented [1] - 2677:22
missed [1] - 2733:14
missing [2] - 2665:3, 2687:22
mission [1] - 2718:13
missions [1] - 2739:22
misspoke [1] - 2729:7
misstatements [3] - 2706:20, 2707:3, 2716:21
mistake [1] - 2587:6
mistaken [1] - 2610:12
mock [1] - 2574:21
model [13] - 2558:5, 2558:8, 2558:11, 2558:13, 2558:16, 2565:19, 2565:20, 2566:1, 2588:4, 2609:5, 2617:21, 2625:3
modeling [1] - 2566:14
models [1] - 2602:16
modify [1] - 2704:18
moment [1] - 2587:9
moments [2] - 2637:3, 2637:16
Monday [11] - 2649:18, 2650:5, 2668:14, 2668:16, 2668:18, 2671:5, 2738:16, 2739:20, 2740:6, 2740:21, 2741:10
monetary [3] - 2559:7, 2685:19, 2685:22
money [43] - 2560:19, 2566:12, 2566:22, 2567:16, 2584:17, 2584:19, 2587:2, 2593:2, 2593:14, 2594:2, 2594:3, 2596:16, 2598:11, 2598:14, 2598:15, 2599:24, 2604:4, 2605:10, 2607:12, 2607:15, 2619:8, 2623:16, 2625:16, 2625:22, 2626:25, 2629:12, 2629:16, 2631:15, 2631:17, 2631:20, 2631:22, 2631:25, 2632:18, 2688:6, 2689:9, 2693:11, 2693:19, 2694:1, 2694:15, 2695:10, 2702:16, 2728:7
monitoring [1] - 2740:20
month [8] - 2562:18, 2563:14, 2581:14, 2583:4, 2583:7, 2590:4, 2603:19, 2611:18
monthly [1] - 2615:5
months [5] - 2580:22, 2581:14, 2584:14, 2623:18, 2664:18
Morgan [2] - 2646:24, 2664:10
morning [26] - 2554:16, 2554:19, 2554:21, 2554:22, 2555:2, 2555:12, 2569:17, 2569:18, 2619:20, 2650:5, 2666:15, 2668:16, 2668:19, 2672:14, 2693:6, 2733:9, 2738:13, 2738:17, 2738:18, 2739:11, 2739:25, 2740:6, 2740:12, 2740:13, 2740:18, 2740:22
mortgage [3] - 2584:23, 2587:16, 2625:20
mortgaged [1] - 2565:8
mortgages [8] - 2565:12, 2584:17, 2584:22, 2587:13, 2587:15, 2587:25, 2614:15, 2617:19
most [8] - 2574:14, 2589:20, 2602:3, 2602:7, 2602:10, 2602:12, 2622:15, 2669:9
mostly [1] - 2709:5
motion [11] - 2652:12, 2653:5, 2654:9, 2654:12, 2673:16, 2673:20, 2676:15, 2682:5, 2696:2, 2710:15, 2736:24
motions [3] - 2736:17, 2737:3, 2737:4
motive [4] - 2632:3, 2675:12, 2733:25, 2734:5
mouth [2] - 2613:5, 2699:14
move [17] - 2588:6, 2597:9, 2598:5, 2606:11, 2606:14, 2606:22, 2609:18, 2610:9, 2610:13, 2627:17, 2628:16, 2652:6, 2658:19, 2659:24, 2665:10, 2695:16, 2696:24
moved [3] - 2585:9, 2625:22, 2710:13
movement [4] - 2565:25, 2585:14, 2587:6, 2624:11
moving [2] - 2648:5, 2739:2
MR [157] - 2554:12, 2554:17, 2561:3, 2569:13, 2569:16, 2577:21, 2589:18, 2589:19, 2596:1, 2606:13, 2606:18, 2609:15, 2613:17, 2614:21, 2615:9, 2616:2, 2618:2, 2618:4, 2618:13, 2618:20, 2619:2, 2619:13, 2619:19, 2620:1, 2627:17, 2629:6, 2634:3, 2634:9, 2634:12, 2635:6, 2635:12, 2635:17, 2636:1, 2636:5, 2636:11, 2636:17, 2637:14, 2639:8, 2648:19, 2649:21, 2649:22, 2649:24, 2650:23, 2650:24, 2652:9, 2652:17, 2653:8, 2653:14, 2653:17, 2653:21, 2653:23, 2654:4, 2654:13, 2654:20, 2654:23, 2655:2, 2655:5, 2656:3, 2656:12, 2656:20, 2656:25, 2657:2, 2657:11, 2657:16, 2657:20, 2660:2, 2660:10, 2661:3, 2661:6, 2661:9, 2661:12, 2661:15, 2661:17, 2661:20, 2661:25, 2662:3, 2662:6, 2662:13, 2663:14, 2663:18, 2664:7, 2665:2, 2665:9, 2665:15, 2668:5, 2673:15, 2674:7, 2674:16, 2675:8, 2676:12, 2678:17, 2678:21, 2679:7, 2679:13, 2679:15, 2680:7, 2680:14, 2680:22, 2686:16, 2686:19, 2686:23, 2687:3, 2687:7, 2687:10, 2687:14, 2688:2, 2688:8, 2688:13, 2690:4, 2690:8, 2696:8, 2696:13, 2696:19, 2697:15, 2698:24, 2699:4, 2699:10, 2702:22, 2703:6, 2704:25, 2705:2, 2705:4, 2705:6, 2705:17, 2706:7, 2708:4, 2709:4, 2709:9, 2709:12, 2709:15, 2714:8, 2718:21, 2718:24, 2719:8, 2720:3, 2721:5, 2721:10, 2721:19, 2723:21,

2724:2, 2724:14, 2724:24, 2725:6, 2725:14, 2725:21, 2726:5, 2731:21, 2731:24, 2734:7, 2734:10, 2734:19, 2740:11, 2740:24, 2741:1, 2741:12, 2742:10, 2742:14
Mr. Sinclair [98] - 2639:7, 2639:15, 2639:18, 2639:22, 2640:1, 2640:3, 2640:5, 2640:10, 2641:1, 2641:2, 2641:7, 2641:16, 2641:19, 2642:11, 2642:15, 2642:22, 2643:23, 2645:4, 2646:5, 2646:11, 2646:15, 2647:3, 2647:10, 2655:12, 2655:14, 2655:21, 2656:6, 2657:15, 2659:3, 2659:7, 2659:10, 2659:16, 2659:20, 2660:5, 2664:2, 2676:20, 2676:25, 2677:2, 2677:8, 2678:6, 2684:20, 2684:22, 2684:25, 2685:5, 2685:14, 2685:23, 2686:4, 2687:23, 2688:5, 2689:3, 2689:12, 2689:15, 2689:25, 2690:22, 2690:25, 2691:22, 2691:25, 2695:23, 2697:3, 2702:3, 2704:8, 2704:11, 2704:22, 2706:13, 2706:18, 2707:4, 2707:12, 2707:24, 2710:6, 2712:2, 2712:10, 2713:7, 2715:5, 2716:17, 2720:9, 2720:13, 2720:17, 2720:21, 2721:20, 2722:21, 2723:16, 2729:13, 2730:2, 2730:6, 2730:12, 2734:3, 2735:23, 2735:24, 2736:2, 2736:6, 2736:11, 2736:14, 2736:21, 2736:23, 2737:1, 2738:19, 2739:2, 2739:17
MS [230] - 2554:20, 2555:3, 2555:8, 2555:19, 2556:5, 2556:7, 2560:25, 2561:5, 2564:8, 2564:16, 2568:13, 2568:21, 2568:22, 2569:10, 2590:24, 2618:14, 2619:24, 2620:16, 2620:18, 2627:20, 2627:25, 2628:3, 2629:3, 2633:15, 2634:5, 2635:23, 2636:18, 2637:17, 2638:5, 2638:13, 2638:15, 2638:23, 2639:1, 2639:4, 2639:11, 2639:23, 2640:8, 2640:15, 2640:17, 2640:21, 2641:11, 2641:21, 2642:8, 2642:12, 2642:17, 2642:24, 2643:3, 2643:10, 2643:16, 2643:21, 2644:5, 2644:6, 2644:10, 2644:12, 2644:16, 2644:24, 2645:10, 2645:14, 2645:15, 2645:17, 2645:21, 2646:3, 2646:6, 2646:21, 2647:15, 2647:17, 2647:21, 2647:25, 2648:21, 2648:25, 2649:2, 2649:8, 2649:11, 2649:25, 2657:4, 2657:24, 2658:2, 2658:6, 2658:8, 2658:11, 2658:15, 2658:17, 2658:24, 2659:6, 2659:13, 2660:1, 2660:7, 2662:17, 2662:21, 2662:23, 2662:25, 2663:3, 2663:6, 2663:20, 2663:24, 2664:4, 2665:11, 2673:10, 2673:18, 2673:24, 2674:3, 2674:6, 2674:11, 2674:17, 2675:18, 2679:16, 2682:8, 2682:11, 2682:14, 2683:9, 2683:16, 2683:19, 2683:21, 2684:2, 2684:6, 2684:15, 2684:17, 2688:14, 2692:17, 2692:24, 2693:4, 2693:13, 2693:20, 2693:23, 2694:2, 2694:6, 2694:11, 2694:19, 2695:1, 2697:20, 2698:7, 2698:9, 2699:20, 2700:2, 2700:8, 2700:16, 2700:24, 2701:2, 2701:14, 2701:17, 2709:20, 2709:24, 2710:8, 2711:11, 2711:17, 2712:13, 2712:24, 2713:3, 2713:6, 2713:10, 2713:17, 2713:20, 2714:2, 2714:16, 2714:20, 2715:2, 2715:11, 2715:14, 2715:18, 2715:24, 2716:5, 2716:19, 2717:3, 2717:13, 2717:18, 2717:20, 2717:22, 2718:3, 2718:5, 2718:10, 2721:9, 2721:11, 2721:14, 2721:23, 2722:1, 2722:8, 2722:16, 2722:23, 2723:4, 2723:11, 2723:13, 2725:24, 2726:4, 2726:9, 2726:18, 2726:21, 2727:1, 2727:4, 2727:13, 2727:19, 2727:22, 2728:1, 2728:3, 2728:13, 2728:18, 2728:23, 2729:7, 2729:16, 2729:21, 2729:23, 2730:15, 2730:20, 2731:5, 2731:8, 2731:14, 2731:19, 2732:10, 2732:17, 2733:3, 2733:5, 2733:10, 2733:14, 2733:16, 2733:22, 2734:24, 2735:3, 2735:6, 2735:12, 2736:7, 2736:22, 2737:11, 2737:19, 2737:24, 2738:3, 2738:24, 2739:12, 2739:19, 2741:11, 2742:8, 2742:12
multiple [1] - 2725:25
multiplicity [1] - 2710:14
must [6] - 2703:24, 2703:25, 2716:21, 2717:6, 2729:19, 2730:23
mutual [2] - 2560:5, 2613:8

N

N.W [1] - 2552:20
Naftalin [3] - 2681:4, 2682:9, 2683:13
NAFTALIN [1] - 2681:4
name [5] - 2555:25, 2569:19, 2612:3, 2646:17, 2695:10
named [1] - 2646:16
names [2] - 2588:3, 2679:14
nation's [1] - 2559:4
National [4] - 2557:14, 2560:7, 2588:19, 2681:16
nature [7] - 2561:15, 2656:6, 2662:11, 2677:22, 2698:19, 2703:14, 2732:14
near [1] - 2667:11
necessarily [6] - 2576:18, 2594:8, 2629:18, 2646:13, 2700:18, 2741:2
necessary [5] - 2652:8, 2696:10, 2726:24, 2735:17, 2738:22
need [27] - 2555:15, 2565:1, 2565:19, 2581:3, 2593:21, 2599:21, 2599:23, 2604:25, 2622:11, 2623:14, 2635:24, 2636:9, 2648:6, 2653:19, 2653:20, 2659:23, 2670:3, 2671:6, 2671:9, 2674:6, 2680:23, 2683:10, 2699:7, 2700:14, 2705:19, 2719:1
needs [3] - 2603:3, 2680:5, 2708:25
negative [5] - 2702:23, 2702:25, 2703:2, 2703:7, 2703:10
neglect [1] - 2703:10
negotiation [1] - 2627:15
neighborhood [1] - 2570:4
net [11] - 2562:17, 2605:1, 2605:9, 2607:10, 2625:15, 2625:17, 2632:4, 2632:11, 2693:20, 2725:10, 2725:17
networth [1] - 2605:19
never [6] - 2569:21, 2595:8, 2595:10, 2595:13, 2631:5, 2734:4
NEW [1] - 2552:1
new [7] - 2563:20, 2566:11, 2566:12, 2601:4, 2622:1, 2623:16, 2628:24
New [16] - 2552:5, 2552:14, 2552:15, 2553:4, 2554:4, 2569:20, 2652:18, 2652:19, 2652:25, 2653:10, 2656:22, 2664:16, 2664:17, 2664:19, 2664:23
next [26] - 2555:6, 2555:13, 2555:18, 2556:19, 2556:22, 2575:22, 2580:14, 2581:17, 2581:21, 2589:7, 2603:13, 2611:23, 2614:19, 2615:22, 2633:16, 2634:11, 2634:14, 2636:20, 2648:9, 2651:1, 2661:24, 2671:11, 2675:15, 2702:15, 2708:22, 2738:5
nexus [8] - 2652:8, 2652:19, 2654:1, 2654:21, 2656:15, 2657:6, 2680:9, 2684:11
nice [3] - 2650:8, 2666:1, 2731:12
night [5] - 2709:16, 2726:11, 2727:2, 2727:20, 2729:6
NINA [1] - 2553:5
Nine [2] - 2653:13, 2653:14
nine [2] - 2653:15, 2681:17
nobody [6] - 2593:2, 2593:13, 2594:2, 2654:2, 2666:20, 2719:5
Nodding) [1] - 2692:17
non [3] - 2590:20, 2646:16, 2725:10
non-attorney [1] - 2590:20
non-defendants [1] - 2646:16
non-real [1] - 2725:10
none [2] - 2594:3, 2633:3
nonetheless [1] - 2625:8
nonpublic [19] - 2616:10, 2616:15, 2616:24, 2617:2, 2617:11, 2617:13, 2702:6, 2702:8, 2702:20, 2702:23, 2702:25, 2703:1, 2703:3, 2703:4, 2703:7, 2703:9, 2703:11, 2704:15, 2705:24
nonrated [1] - 2621:4
normal [1] - 2655:3
North [1] - 2557:8
Nos [1] - 2737:16
note [5] - 2554:10, 2592:17, 2627:2, 2698:2, 2733:14
noted [2] - 2592:15, 2601:12
nothing [7] - 2586:13, 2605:15, 2606:19, 2623:14, 2627:6, 2662:9, 2719:12
notice [1] - 2708:11
November [3] - 2552:7, 2664:24, 2741:15
nuances [1] - 2597:1
number [15] - 2562:11, 2570:17, 2570:21, 2573:4, 2574:12, 2574:15, 2575:6, 2579:8, 2631:24, 2643:17, 2643:24, 2644:19, 2645:5, 2665:1, 2709:15
numbers [2] - 2633:14

O

o'clock [12] - 2555:16, 2637:11, 2637:19, 2647:22, 2647:24, 2648:6, 2650:24, 2666:15, 2672:14, 2733:8,

2738:9, 2741:8
oath [1] - 2671:9
object [20] - 2627:17, 2638:6, 2645:24, 2694:7, 2701:18, 2712:24, 2713:18, 2714:16, 2714:22, 2723:7, 2723:9, 2723:14, 2723:25, 2724:8, 2724:9, 2724:23, 2726:19, 2731:21, 2736:22, 2736:25
objected [2] - 2659:7, 2708:7
objecting [2] - 2700:9, 2713:9
objection [18] - 2618:14, 2618:20, 2639:6, 2639:16, 2659:1, 2659:10, 2659:12, 2663:18, 2701:1, 2704:22, 2715:11, 2715:12, 2721:18, 2721:20, 2725:24, 2730:15, 2734:19, 2736:7
objections [8] - 2639:20, 2641:23, 2709:15, 2725:23, 2727:23, 2735:7, 2735:10, 2737:12
objective [1] - 2717:1
objectives [1] - 2725:25
objects [1] - 2726:1
obligation [4] - 2587:18, 2704:4, 2705:8, 2708:16
obligations [1] - 2562:16
observation [1] - 2654:14
obtained [1] - 2623:17
obviously [4] - 2557:25, 2652:13, 2681:23, 2705:25
occasionally [1] - 2631:23
occasions [2] - 2559:17, 2706:17
occur [1] - 2592:23
occurred [4] - 2593:1, 2630:5, 2630:7, 2654:16
October [1] - 2734:22
OF [3] - 2552:1, 2552:3, 2552:10
offense [4] - 2653:25, 2654:6, 2654:22, 2715:25
offer [11] - 2566:8, 2567:17, 2572:5, 2572:7, 2572:24, 2578:1, 2578:5, 2635:24, 2637:25, 2660:10, 2696:13
offered [5] - 2564:3, 2600:10, 2610:15, 2618:17, 2641:3
offering [4] - 2591:22, 2600:13, 2609:7, 2641:8
offers [2] - 2572:2, 2658:12
office [1] - 2652:22
officers [1] - 2736:14
offices [2] - 2570:8, 2738:14
Official [1] - 2553:11
oil [4] - 2558:6, 2558:7, 2558:17, 2558:19
ointment [1] - 2584:7
old [1] - 2594:4
omission [7] - 2707:13, 2708:7, 2717:25, 2718:6, 2719:19, 2719:20, 2720:24
omissions [9] - 2706:12, 2707:1, 2707:6, 2708:5, 2718:8, 2718:9, 2720:2, 2720:6, 2720:16
omit [1] - 2674:15
omitted [1] - 2718:17
once [7] - 2649:11, 2669:12, 2672:6, 2692:14, 2696:1, 2698:17, 2706:3
one [100] - 2561:25, 2565:1, 2565:21, 2566:18, 2567:13, 2567:18, 2568:9, 2568:21, 2571:8, 2578:19, 2581:21, 2585:3, 2587:21, 2588:11, 2590:8, 2591:9, 2592:6, 2597:5, 2599:12, 2599:13, 2600:12, 2601:12, 2601:13, 2602:12, 2602:15, 2604:17, 2612:24, 2614:9, 2615:3, 2624:18, 2625:12, 2626:6, 2627:11, 2632:1, 2637:2, 2638:7, 2638:17, 2639:23, 2640:4, 2640:25, 2642:8, 2642:17, 2643:17, 2645:8, 2645:10, 2645:13, 2645:14, 2646:1, 2647:8, 2647:13, 2647:19, 2649:4, 2652:15, 2653:1, 2656:12, 2657:16, 2658:20, 2658:25, 2659:2, 2661:10, 2663:11, 2670:3, 2673:12, 2675:22, 2678:8, 2684:16, 2686:13, 2686:17, 2690:4, 2690:12, 2695:21, 2700:23, 2702:5, 2703:19, 2710:12, 2710:13, 2710:25, 2712:6, 2712:22, 2713:23, 2715:19, 2716:8, 2717:16, 2718:22, 2720:19, 2725:8, 2725:21, 2725:23, 2726:1, 2726:3, 2728:1, 2728:7, 2729:14, 2729:15, 2731:5, 2732:17, 2733:3, 2736:18
one's [1] - 2732:23
one-liner [1] - 2640:4
ones [3] - 2602:9, 2605:15, 2633:19
ongoing [2] - 2563:1, 2563:14
open [15] - 2554:1, 2554:2, 2637:1, 2652:2, 2653:7, 2657:7, 2657:24, 2672:6, 2673:1, 2674:20, 2691:3, 2694:21, 2696:7, 2697:2, 2739:15
opened [1] - 2712:14
opening [1] - 2715:7
operate [5] - 2563:14, 2565:18, 2567:3, 2567:4, 2582:6
operating [1] - 2583:12
operation [2] - 2559:22, 2560:9
operational [2] - 2622:3, 2622:8
opine [9] - 2563:17, 2564:1, 2564:7, 2565:17, 2575:3, 2580:8, 2580:9, 2591:24, 2695:18
opinion [28] - 2561:19, 2562:14, 2563:2, 2563:7, 2563:21, 2573:12, 2578:1, 2578:13, 2580:4, 2580:14, 2581:17, 2582:18, 2582:21, 2582:24, 2583:11, 2589:23, 2591:20, 2591:22, 2597:21, 2597:23, 2601:2, 2611:1, 2615:15, 2616:5, 2626:24, 2627:12, 2628:14, 2639:14
opinions [18] - 2561:13, 2563:6, 2563:9, 2564:10, 2564:11, 2568:18, 2571:17, 2578:6, 2578:7, 2591:16, 2597:24, 2601:1, 2601:2, 2601:4, 2604:11, 2608:20, 2609:3, 2610:15
opportunistic [1] - 2595:17
opportunities [1] - 2626:4
opportunity [16] - 2564:14, 2564:19, 2609:17, 2626:12, 2648:11, 2650:6, 2652:8, 2653:6, 2666:12, 2678:5, 2678:19, 2681:22, 2703:20, 2707:20, 2735:10, 2738:14
oppose [3] - 2700:5, 2700:6
opposed [4] - 2592:13, 2617:3, 2710:14, 2714:4
opposite [2] - 2603:25, 2604:2
opposition [2] - 2595:14, 2699:19
orally [1] - 2670:12
order [6] - 2621:3, 2622:21, 2671:6, 2691:3, 2703:23, 2709:25
orderly [1] - 2650:16
ordinary [1] - 2694:21
organization [1] - 2616:6
organized [1] - 2594:5
original [1] - 2673:19
otherwise [3] - 2627:19, 2692:19, 2723:12
outcome [3] - 2580:24, 2603:20, 2603:21
outside [3] - 2557:13, 2575:4, 2576:23
overlooked [1] - 2727:1
overnight [1] - 2696:9
overrules [1] - 2711:13
oversight [1] - 2726:10
oversimplification [1] - 2616:24
overstate [1] - 2601:13
overt [4] - 2726:12, 2726:14, 2726:16, 2726:24
owes [1] - 2704:3
own [13] - 2566:4, 2567:14, 2576:15, 2578:9, 2578:23, 2601:9, 2603:12, 2608:14, 2608:17, 2622:9, 2683:6, 2702:17
owned [2] - 2598:20, 2694:23

P

p.m [7] - 2620:5, 2620:13, 2637:8, 2652:2, 2660:13, 2672:16, 2674:20
p.m. [1] - 2650:25
Page [17] - 2704:8, 2704:10, 2705:9, 2713:3, 2713:21, 2715:24, 2718:3, 2722:8, 2722:9, 2726:23, 2728:5, 2728:20, 2730:3, 2730:16, 2736:2, 2736:6, 2736:12
page [11] - 2570:19, 2577:22, 2578:6, 2593:6, 2611:23, 2634:14, 2636:20, 2651:1, 2670:14, 2717:22
PAGE [2] - 2742:3, 2742:17
pages [3] - 2570:21, 2592:3, 2731:7
paid [5] - 2561:18, 2569:2, 2578:1, 2586:6, 2738:10
pair [2] - 2626:16, 2640:22
pair-wise [1] - 2626:16
Paleika [1] - 2646:16
paper [3] - 2575:19, 2621:12, 2621:13
paragraphs [2] - 2582:22
parallel [1] - 2677:17
part [28] - 2566:13, 2575:16, 2575:25, 2580:14, 2596:6, 2596:10, 2603:23, 2609:4, 2614:2, 2622:16, 2626:7, 2667:3, 2669:8, 2669:16, 2669:23, 2671:21, 2689:17, 2692:4, 2708:5, 2714:19, 2716:1, 2716:19, 2720:14, 2722:6, 2725:12, 2726:10, 2728:20, 2733:10
partially [1] - 2608:24
participants [1] - 2585:17
participated [3] - 2574:21, 2575:17, 2576:15
participation [1] - 2576:7
particular [34] - 2557:24, 2563:10,

2572:9, 2587:25, 2591:18, 2603:4, 2611:11, 2612:19, 2613:2, 2614:14, 2615:18, 2615:20, 2617:2, 2623:1, 2625:15, 2625:17, 2627:14, 2635:11, 2650:18, 2665:4, 2669:1, 2678:10, 2691:16, 2692:10, 2692:15, 2699:21, 2707:9, 2711:25, 2712:1, 2718:24, 2719:1, 2719:24, 2739:9
particularly [2] - 2633:23, 2725:25
parties [16] - 2554:24, 2579:7, 2592:21, 2593:15, 2596:14, 2599:25, 2648:21, 2659:5, 2662:14, 2663:15, 2664:8, 2664:25, 2665:21, 2666:12, 2704:20, 2705:21
partner [1] - 2674:12
partnership [2] - 2677:16, 2678:13
parts [2] - 2609:4, 2669:7
party [4] - 2646:20, 2703:20, 2703:25, 2728:13
passed [2] - 2705:13, 2738:8
past [5] - 2560:7, 2573:21, 2573:22, 2589:1, 2714:12
path [1] - 2565:22
PATRICK [1] - 2552:16
Patrick [1] - 2554:13
Paul [1] - 2712:12
pay [4] - 2586:13, 2650:17, 2712:11, 2738:9
pedestrian [1] - 2590:7
peer [1] - 2560:14
pending [2] - 2591:14, 2591:17
people [30] - 2567:9, 2567:24, 2570:6, 2570:12, 2570:17, 2585:20, 2586:16, 2595:2, 2596:15, 2597:24, 2600:11, 2603:24, 2604:2, 2604:13, 2604:21, 2606:20, 2610:16, 2610:21, 2646:20, 2666:1, 2676:21, 2685:19, 2688:2, 2689:20, 2689:22, 2692:20, 2692:21, 2715:10, 2727:9, 2741:7
percent [10] - 2572:7, 2572:10, 2572:11, 2572:17, 2601:15, 2621:3, 2623:5, 2623:8, 2659:18, 2725:10
perfect [3] - 2709:17, 2709:18, 2709:20
perfectly [5] - 2586:3, 2671:19, 2675:13, 2686:15, 2721:19
perform [4] - 2559:24, 2561:6, 2585:3, 2585:6
performance [1] - 2561:25
performed [3] - 2562:6, 2622:5, 2623:9
performing [1] - 2569:7
perhaps [6] - 2601:13, 2628:16, 2696:20, 2707:17, 2724:4, 2731:5
period [27] - 2566:12, 2567:7, 2576:4, 2579:7, 2594:14, 2597:22, 2600:13, 2601:18, 2609:8, 2621:16, 2622:2, 2622:15, 2622:24, 2623:21, 2626:20, 2627:2, 2628:5, 2630:3, 2630:13, 2630:20, 2632:19, 2633:4, 2637:4, 2653:10, 2666:21, 2732:4, 2741:5
periodically [2] - 2622:20, 2727:18
periods [4] - 2584:13, 2590:4, 2622:10, 2623:13
permissible [1] - 2654:18
permit [1] - 2630:1
permitted [3] - 2653:24, 2693:5, 2693:9
permutations [1] - 2725:21
person [9] - 2573:18, 2627:14, 2647:7, 2647:12, 2648:19, 2699:14, 2702:15, 2702:18, 2704:14
personal [2] - 2671:11, 2732:23
personality [1] - 2727:16
personally [1] - 2588:18
persons [1] - 2704:3
perspective [3] - 2562:25, 2563:13, 2709:3
pertinence [1] - 2717:6
Peter [1] - 2712:11
Ph.D [2] - 2556:22, 2557:4
philosophy [2] - 2603:5, 2603:10
phone [2] - 2615:1, 2653:12
phrase [1] - 2616:14
pick [2] - 2614:4, 2615:1
pickup [2] - 2569:23, 2602:5
piece [4] - 2571:25, 2578:19, 2663:11, 2699:14
pieces [3] - 2566:16, 2569:9, 2578:12
pin [1] - 2695:21
Pinkerton [5] - 2698:16, 2701:4, 2701:5, 2701:8, 2701:23
place [10] - 2566:5, 2588:17, 2595:5, 2595:19, 2604:5, 2642:25, 2650:9, 2688:19, 2689:6, 2731:24
placed [1] - 2663:10
placement [2] - 2621:25, 2708:10
places [1] - 2718:5
plain [1] - 2593:21
plaintiff's [1] - 2677:25
Plaintiffs [1] - 2553:3
plaintiffs [3] - 2677:14, 2678:2, 2681:12
plan [6] - 2564:4, 2590:17, 2649:19, 2668:11, 2670:12, 2738:9
plans [2] - 2671:5, 2671:11
play [7] - 2566:19, 2586:9, 2588:10, 2590:6, 2593:15, 2609:9, 2643:1
played [1] - 2566:21
plays [1] - 2697:14
Plaza [1] - 2552:15
pleasant [1] - 2660:16
pleased [1] - 2560:18
pleasure [1] - 2660:17
pled [1] - 2721:15
plenty [1] - 2568:19
plight [1] - 2626:5
plus [2] - 2578:9, 2599:2
point [18] - 2565:21, 2592:4, 2598:1, 2610:11, 2620:1, 2622:7, 2627:7, 2629:15, 2635:8, 2654:14, 2656:12, 2657:4, 2664:4, 2665:25, 2683:12, 2690:4, 2712:13, 2732:17
pointed [2] - 2685:23, 2720:13
points [3] - 2566:1, 2624:7, 2690:12
policies [2] - 2559:13, 2559:21
policy [6] - 2556:23, 2557:17, 2557:22, 2558:1, 2559:7, 2560:20
pools [1] - 2587:15
popular [1] - 2560:18
pore [1] - 2621:3
PORSHA [3] - 2562:12, 2573:11, 2610:2
portfolio [30] - 2566:4, 2611:8, 2611:9, 2611:10, 2612:2, 2612:3, 2612:5, 2612:10, 2612:11, 2612:16, 2612:22, 2613:15, 2614:10, 2614:24, 2614:25, 2615:4, 2615:11, 2616:7, 2617:2, 2625:13, 2630:10, 2631:7, 2633:4, 2722:21, 2722:23, 2736:15, 2736:18, 2737:2, 2737:6, 2737:7
portfolios [1] - 2620:21
Portia [3] - 2617:23, 2625:17, 2631:6
portion [1] - 2725:25
portions [2] - 2626:5, 2670:21
posed [2] - 2580:6, 2582:3
position [15] - 2565:11, 2603:1, 2632:4, 2632:23, 2638:6, 2646:12, 2648:14, 2648:17, 2653:22, 2683:8, 2686:19, 2690:18, 2696:14, 2705:6, 2705:7
positions [9] - 2557:6, 2631:20, 2631:22, 2631:23, 2632:2, 2632:6, 2632:10, 2632:13, 2632:20
positive [8] - 2580:16, 2580:19, 2580:23, 2581:13, 2582:9, 2583:8, 2625:9, 2658:5
possession [2] - 2702:5, 2704:15
possibilities [1] - 2579:12
possibility [8] - 2600:7, 2635:15, 2635:17, 2636:7, 2648:6, 2720:7, 2740:20, 2741:2
possible [5] - 2600:25, 2603:14, 2636:12, 2647:7, 2725:20
possibly [6] - 2607:9, 2628:25, 2657:18, 2686:13, 2724:24, 2739:7
post [3] - 2594:14, 2632:21, 2633:1
posting [1] - 2623:4
potential [2] - 2611:1, 2725:4
potentiality [1] - 2578:18
potentially [2] - 2573:14, 2610:1
pouring [1] - 2598:14
power [1] - 2703:20
Powerball [1] - 2605:11
PPM [3] - 2580:12, 2606:7, 2698:10
practical [3] - 2556:12, 2615:16, 2724:20
practice [2] - 2716:11, 2716:23
precisely [1] - 2591:19
preclude [1] - 2695:6
precluded [1] - 2641:4
predicate [2] - 2644:14, 2712:20
predict [1] - 2558:15
predicted [3] - 2586:25, 2587:1, 2625:4
predictions [1] - 2584:1
preference [2] - 2637:14, 2637:15
prejudice [1] - 2657:18
prejudicial [1] - 2656:7
preliminary [3] - 2667:7, 2669:15, 2675:19
preparation [2] - 2648:16, 2673:8
prepare [4] - 2682:2, 2696:5, 2709:2, 2735:21
prepared [7] - 2564:3, 2648:1,

2648:18, 2649:1, 2657:22, 2657:23, 2716:15
preparing [2] - 2574:7, 2666:13
preponderance [2] - 2697:16, 2697:18
prescribed [1] - 2686:1
presence [2] - 2635:3, 2715:7
present [8] - 2554:2, 2555:11, 2568:2, 2568:6, 2589:14, 2729:2, 2729:17, 2737:19
Present [1] - 2553:8
preservation [1] - 2734:20
preserve [2] - 2730:15, 2735:12
preserves [1] - 2732:23
preserving [3] - 2697:21, 2717:18, 2738:1
President [2] - 2575:22, 2664:10
president [3] - 2557:22, 2557:24, 2576:15
presiding [1] - 2554:5
pressure [5] - 2648:12, 2650:21, 2656:9, 2666:21, 2666:25
pressured [1] - 2666:12
presumably [1] - 2703:11
presume [1] - 2597:19
presumption [1] - 2669:10
pretrial [2] - 2710:14, 2733:7
pretty [4] - 2663:15, 2669:4, 2680:2, 2689:15
prevailing [1] - 2624:2
previous [3] - 2574:1, 2729:14, 2730:7
previously [3] - 2560:21, 2620:19, 2646:18
price [3] - 2617:6, 2617:18, 2625:22
prices [33] - 2558:6, 2558:19, 2565:22, 2565:25, 2585:9, 2585:10, 2585:15, 2586:12, 2586:24, 2586:25, 2587:7, 2588:4, 2588:7, 2588:16, 2594:11, 2594:23, 2595:14, 2595:22, 2597:16, 2597:18, 2599:5, 2611:9, 2619:3, 2619:11, 2624:2, 2624:3, 2624:5, 2624:12, 2625:4, 2625:5, 2625:8, 2625:16
pricing [1] - 2626:4
primary [1] - 2564:10
principal [6] - 2557:23, 2564:2, 2571:3, 2571:19, 2667:9, 2667:12
principally [3] - 2556:14, 2559:11, 2570:18
principals [1] - 2625:11
principles [1] - 2669:9
private [4] - 2556:16, 2556:19, 2681:12, 2708:9
probability [1] - 2587:22
probative [2] - 2606:22, 2619:18
problem [22] - 2592:20, 2592:21, 2593:1, 2594:4, 2594:24, 2595:1, 2596:2, 2596:6, 2596:10, 2596:24, 2600:17, 2600:18, 2629:20, 2640:1, 2650:17, 2652:25, 2657:19, 2664:1, 2722:15, 2725:16, 2729:11, 2731:22
problem" [1] - 2592:22
problems [5] - 2601:12, 2610:2, 2663:22, 2675:4, 2739:5
proceeding [2] - 2569:2, 2700:18
Proceedings [2] - 2553:14, 2634:14
proceedings [3] - 2584:20, 2670:16, 2741:14
proceeds [1] - 2701:19
process [4] - 2564:4, 2571:11, 2656:8, 2700:7
produce [1] - 2656:17
produced [4] - 2553:14, 2562:17, 2575:19, 2676:7
products [1] - 2565:16
professional [1] - 2559:9
Professor [2] - 2693:6, 2703:8
professor [5] - 2556:10, 2556:11, 2556:17, 2556:18, 2584:11
profit [1] - 2566:6
profitability [1] - 2626:9
profitable [5] - 2563:1, 2563:13, 2566:15, 2586:23, 2624:25
profitably [1] - 2567:4
profited [2] - 2733:19
profits [2] - 2564:25, 2626:13
program [1] - 2556:21
progress [1] - 2681:19
project [2] - 2625:9
prominence [1] - 2729:3
prominently [1] - 2610:6
promotes [1] - 2726:24
prompt [1] - 2666:16
prongs [1] - 2684:2
proof [8] - 2669:10, 2683:14, 2683:16, 2683:23, 2727:9, 2733:25, 2734:4, 2734:7
proofreading [1] - 2714:19
properly [2] - 2671:7, 2709:2
properties [1] - 2576:13
property [1] - 2702:16
proposals [1] - 2735:25
propose [3] - 2693:8, 2735:25, 2738:7
Proposed [4] - 2675:2, 2694:12, 2694:19, 2729:16
proposed [18] - 2639:16, 2673:3, 2691:20, 2694:13, 2713:2, 2717:5, 2726:21, 2727:7, 2729:7, 2731:4, 2731:6, 2731:10, 2731:16, 2732:11, 2732:19, 2734:21, 2734:22, 2737:15
proposition [5] - 2655:20, 2680:13, 2681:2, 2682:14, 2684:20
proprietary [2] - 2613:24, 2614:17
prosecution [2] - 2681:7, 2682:24
prosecutor [2] - 2627:20, 2628:9
prospect [1] - 2611:3
prospects [1] - 2562:7
protected [1] - 2727:25
proven [2] - 2684:7, 2720:3
provide [5] - 2561:19, 2574:24, 2581:18, 2693:1, 2693:4
provided [14] - 2555:4, 2558:3, 2558:21, 2578:8, 2578:9, 2578:24, 2579:2, 2590:9, 2610:2, 2611:4, 2616:10, 2628:23, 2633:19, 2709:16
providing [1] - 2567:9
proxy [2] - 2605:18, 2693:7
prudent [1] - 2624:6
psychologically [1] - 2671:12
public [14] - 2559:12, 2604:24, 2611:11, 2611:16, 2612:11, 2616:16, 2616:23, 2617:3, 2617:11, 2617:13, 2617:20, 2617:21, 2617:24, 2705:25
publications [3] - 2559:25, 2560:11, 2560:12
publicly [4] - 2611:6, 2611:8, 2611:9, 2611:20
puffery [5] - 2731:17, 2731:19, 2732:7, 2732:14, 2737:20
pull [1] - 2603:17
pulled [1] - 2592:24
purchase [29] - 2586:8, 2676:3, 2676:6, 2676:21, 2678:1, 2679:10, 2679:18, 2682:20, 2683:10, 2683:17, 2685:7, 2685:18, 2686:20, 2686:22, 2686:23, 2686:25, 2687:6, 2687:8, 2687:9, 2687:13, 2687:14, 2688:23, 2689:1, 2706:22, 2711:9, 2711:22, 2733:24, 2734:13, 2737:21
purchased [4] - 2689:2, 2689:3, 2711:2, 2711:24
purchaser [2] - 2682:16, 2683:12
purchases [5] - 2681:11, 2685:6, 2685:8, 2688:13, 2689:4
purchasing [1] - 2687:17
purely [1] - 2606:4
purpose [7] - 2562:21, 2653:7, 2665:4, 2667:8, 2713:18, 2714:3, 2723:2
purposes [7] - 2555:16, 2568:3, 2568:6, 2589:14, 2724:3, 2724:15, 2734:20
pursued [1] - 2565:14
pursuing [1] - 2604:7
put [34] - 2560:12, 2570:19, 2571:16, 2582:17, 2586:19, 2587:15, 2587:17, 2601:19, 2605:10, 2607:12, 2613:4, 2641:21, 2641:22, 2647:18, 2648:15, 2650:8, 2657:23, 2659:8, 2660:23, 2661:1, 2662:10, 2675:14, 2675:22, 2678:15, 2683:7, 2685:3, 2691:18, 2726:14, 2732:8, 2732:12, 2735:16, 2736:18
puts [1] - 2703:16
putting [6] - 2598:14, 2600:2, 2628:21, 2680:8, 2686:11, 2689:9

Q

QSIP [1] - 2615:20
qualifications [2] - 2575:3, 2693:15
qualified [5] - 2619:5, 2693:14, 2693:18, 2693:22, 2693:25
qualify [5] - 2567:20, 2673:4, 2676:3, 2686:13, 2688:19
quarter [1] - 2733:7
Quental [3] - 2641:16, 2641:19, 2698:9
questioned [1] - 2641:20
questions [30] - 2561:3, 2561:19, 2562:23, 2564:22, 2568:1, 2568:10, 2568:12, 2568:14, 2571:6, 2575:3, 2579:22, 2582:13, 2589:17, 2596:3, 2599:16, 2604:14, 2604:16, 2604:18, 2604:20, 2604:21, 2612:18, 2612:21, 2618:1, 2619:18, 2629:3, 2631:10, 2634:4, 2653:9, 2685:15, 2696:21
quick [1] - 2673:10

quickly [1] - 2638:21
quit [1] - 2600:25
quite [1] - 2565:15
quote [2] - 2676:4, 2676:9
quoting [1] - 2632:21

R

Raggi [2] - 2680:20, 2690:3
rail [1] - 2701:4
raise [2] - 2582:7, 2681:23
raised [2] - 2653:4, 2696:25
raising [2] - 2556:16, 2622:14
rallying [1] - 2597:17
Ralph [5] - 2552:20, 2554:9, 2554:24, 2664:22, 2725:10
RALPH [1] - 2552:7
range [1] - 2574:16
rate [1] - 2573:19
rated [3] - 2620:25, 2625:24, 2625:25
rather [4] - 2591:1, 2625:9, 2645:2, 2714:11
rating [2] - 2588:25, 2610:8
RDR [1] - 2553:11
Re [1] - 2572:13
reached [1] - 2622:4
reaching [1] - 2621:20
read [23] - 2590:21, 2601:25, 2602:3, 2602:7, 2602:9, 2602:18, 2602:20, 2602:22, 2606:12, 2611:12, 2654:17, 2655:17, 2656:10, 2657:10, 2658:20, 2660:9, 2660:10, 2660:11, 2662:16, 2664:3, 2664:4, 2680:11, 2727:19
readback [1] - 2670:18
reading [2] - 2573:10, 2663:18
ready [4] - 2665:16, 2668:23, 2709:5, 2709:6
real [11] - 2567:16, 2576:13, 2589:9, 2630:16, 2648:5, 2666:3, 2670:12, 2689:17, 2725:10, 2739:5, 2739:7
real-time [1] - 2630:16
realistic [2] - 2649:23, 2699:7
realistically [1] - 2649:17
really [33] - 2555:15, 2557:23, 2558:13, 2573:3, 2573:18, 2581:5, 2599:25, 2606:6, 2607:2, 2619:15, 2627:3, 2629:15, 2675:25, 2686:2, 2688:25, 2692:19, 2695:11, 2696:22, 2706:4, 2707:2, 2707:9, 2707:10, 2712:4, 2713:24, 2714:9, 2716:20, 2718:16, 2725:16, 2731:24, 2734:12, 2734:15, 2735:20, 2740:20
realm [1] - 2616:23
rear [1] - 2740:18
reargue [1] - 2739:8
reason [20] - 2573:23, 2578:15, 2584:1, 2585:5, 2592:7, 2594:22, 2598:1, 2600:12, 2626:10, 2626:17, 2629:24, 2659:6, 2666:3, 2670:3, 2673:13, 2682:12, 2685:16, 2693:5, 2708:8, 2739:8
reasonable [47] - 2562:24, 2563:3, 2563:13, 2563:19, 2563:24, 2564:24, 2565:18, 2566:11, 2566:15, 2567:3, 2574:16, 2580:22, 2581:9, 2581:12, 2582:8, 2582:18, 2582:25, 2583:4, 2583:6, 2583:10, 2584:2, 2586:4, 2586:17, 2589:25, 2590:17, 2597:19, 2601:5, 2601:7, 2603:20, 2603:24, 2603:25, 2622:5, 2624:20, 2624:22, 2633:4, 2656:14, 2669:11, 2691:15, 2691:19, 2692:9, 2692:14, 2694:13, 2694:24, 2695:4, 2740:11, 2741:5
reasonably [7] - 2565:21, 2586:23, 2603:16, 2617:8, 2625:9, 2626:25, 2701:10
reasons [9] - 2564:12, 2564:18, 2583:17, 2592:4, 2595:23, 2599:11, 2632:1, 2653:1, 2713:24
rebuild [2] - 2622:11, 2623:14
rebuilding [1] - 2622:13
rebut [1] - 2667:10
rebuttal [12] - 2636:4, 2637:22, 2665:14, 2665:17, 2667:5, 2667:8, 2667:14, 2667:18, 2668:10, 2668:15, 2740:5, 2741:10
Receive [1] - 2559:1
received [9] - 2557:1, 2557:4, 2571:5, 2572:17, 2573:3, 2602:17, 2602:18, 2665:6, 2742:19
receiving [1] - 2652:12
recent [2] - 2574:14, 2624:5
recently [4] - 2572:14, 2622:22, 2624:2, 2630:7
Recess [2] - 2620:7, 2674:19
recess [2] - 2640:14, 2650:25
recipient [2] - 2578:19, 2578:21
recitation [1] - 2574:24
recollect [1] - 2705:15
recollection [1] - 2621:2
recommendation [3] - 2722:5, 2722:14, 2722:24
reconsideration [1] - 2708:23
reconvene [1] - 2674:13
record [22] - 2554:11, 2556:1, 2615:19, 2635:2, 2636:13, 2652:13, 2656:24, 2671:25, 2674:4, 2674:21, 2676:21, 2680:21, 2682:3, 2692:24, 2702:24, 2719:11, 2725:8, 2725:17, 2734:20, 2735:10, 2737:11, 2738:1
recorded [1] - 2553:14
records [3] - 2579:4, 2620:20, 2664:20
recover [1] - 2677:14
RECROSS [2] - 2629:5, 2742:13
RECROSS-EXAMINATION [2] - 2629:5, 2742:13
redeem [9] - 2600:3, 2601:9, 2601:17, 2676:17, 2677:19, 2678:16, 2687:21, 2687:24, 2708:10
redeemed [1] - 2600:6
redeeming [4] - 2687:16, 2687:18, 2688:2, 2689:10
redemption [25] - 2592:9, 2592:15, 2592:20, 2592:23, 2593:12, 2593:22, 2594:1, 2594:10, 2594:22, 2595:19, 2595:21, 2596:6, 2597:4, 2599:13, 2683:15, 2683:18, 2683:24, 2684:6, 2684:13, 2684:17, 2686:12, 2686:24, 2688:7, 2688:8, 2688:11
redemptions [20] - 2591:5, 2591:13, 2591:17, 2593:9, 2596:21, 2629:24, 2630:2, 2684:24, 2684:25, 2685:2, 2685:3, 2685:13, 2686:10, 2686:11, 2688:18, 2712:16, 2720:22, 2720:25
REDIRECT [2] - 2620:17, 2742:11
redirect [5] - 2564:15, 2596:4, 2609:16, 2619:21, 2619:23
reduce [1] - 2657:14
refer [2] - 2580:25, 2681:3
referable [1] - 2736:9
reference [4] - 2652:22, 2673:18, 2691:13, 2692:25
references [1] - 2570:25
referred [2] - 2576:17, 2613:19
referring [1] - 2643:19
refinancing [1] - 2628:24
reflect [5] - 2636:4, 2636:5, 2637:22, 2657:10, 2708:21
reflected [1] - 2623:11
reflects [1] - 2685:10
reform [2] - 2575:18, 2575:19
reforms [1] - 2588:22
regard [2] - 2727:22, 2738:3
regular [2] - 2567:21, 2570:12
regularly [1] - 2570:9
regulations [9] - 2559:7, 2576:2, 2677:3, 2677:4, 2693:1, 2693:2, 2693:3, 2693:4, 2693:14
Regulations [1] - 2560:8
regulatory [2] - 2560:6, 2664:15
rehash [1] - 2739:14
reinforces [1] - 2681:2
reinforcing [1] - 2641:17
reiterate [1] - 2734:20
relate [4] - 2685:13, 2711:14, 2711:25, 2726:19
related [8] - 2559:20, 2576:20, 2602:16, 2607:24, 2643:17, 2658:12, 2698:1, 2712:15
relates [3] - 2607:7, 2711:9, 2716:9
relating [6] - 2559:7, 2561:7, 2607:22, 2610:19, 2628:10, 2711:22
relationship [8] - 2702:11, 2702:12, 2703:17, 2703:19, 2703:23, 2704:2, 2704:16, 2705:20
relative [6] - 2614:3, 2626:5, 2626:9, 2626:13, 2626:15, 2631:23
Relative [3] - 2626:1, 2626:3, 2626:7
relaxed [1] - 2666:24
relevance [4] - 2589:21, 2639:15, 2645:2, 2647:11
relevancy [2] - 2659:8, 2659:14
relevant [13] - 2581:5, 2589:11, 2602:10, 2602:12, 2631:8, 2631:10, 2632:17, 2677:4, 2687:14, 2706:16, 2720:1, 2722:20, 2728:11
reliance [13] - 2678:22, 2679:22, 2680:3, 2680:6, 2680:8, 2680:10, 2680:11, 2680:17, 2691:2, 2691:6, 2691:7, 2698:3, 2703:18
relied [2] - 2610:10, 2616:5
relief [1] - 2685:22
rely [1] - 2656:18
relying [2] - 2706:11, 2707:1
remain [1] - 2587:7

remainder [1] - 2728:24
remains [1] - 2665:20
remarks [4] - 2665:21, 2666:13, 2666:18, 2667:7
remember [11] - 2575:18, 2579:8, 2585:12, 2586:2, 2593:4, 2600:25, 2625:11, 2633:13, 2658:2, 2663:4, 2671:8
remind [2] - 2663:1, 2712:19
remove [1] - 2728:8
render [2] - 2561:13, 2719:19
renew [2] - 2673:11, 2673:15
renews [1] - 2673:25
reopen [7] - 2653:24, 2654:7, 2654:11, 2654:19, 2655:9, 2655:18, 2655:23
reopened [1] - 2655:1
repeat [2] - 2667:8, 2735:15
repetitious [4] - 2609:11, 2609:18, 2666:23, 2667:13
rephrased [1] - 2710:9
replete [1] - 2615:19
repo [14] - 2586:5, 2586:13, 2588:9, 2590:5, 2592:20, 2592:23, 2593:14, 2596:14, 2597:5, 2598:2, 2599:13, 2621:7, 2623:4, 2627:3
Repo [1] - 2596:17
report [29] - 2555:3, 2564:3, 2569:9, 2570:19, 2570:24, 2571:1, 2571:2, 2571:3, 2571:5, 2571:9, 2571:17, 2571:18, 2571:20, 2573:6, 2573:9, 2574:7, 2577:16, 2577:22, 2581:1, 2586:25, 2588:20, 2592:3, 2592:4, 2592:13, 2592:17, 2593:6, 2599:11, 2611:12, 2624:16
reportedly [2] - 2703:3, 2703:7
Reporter [2] - 2553:11, 2553:11
reporter's [1] - 2722:11
reporters [1] - 2670:20
reports [2] - 2562:18, 2607:25
representation [4] - 2684:12, 2686:21, 2730:7, 2732:24
representations [1] - 2712:14
representing [2] - 2655:12, 2655:16
repurchase [6] - 2565:7, 2567:8, 2585:23, 2598:15, 2598:22, 2599:4
repurchasing [2] - 2598:6, 2598:9
request [11] - 2648:15, 2675:15, 2676:1, 2715:5, 2715:14, 2717:3, 2721:14, 2727:6, 2728:8, 2734:21, 2737:14
requested [2] - 2728:14, 2732:20
requests [10] - 2592:9, 2592:15, 2592:20, 2592:23, 2594:10, 2594:22, 2599:13, 2601:20, 2737:13, 2738:3
require [2] - 2696:6, 2740:19
required [1] - 2688:23
requirement [4] - 2605:6, 2676:5, 2677:25, 2733:23
requirements [3] - 2588:24, 2605:4, 2605:8
requires [5] - 2628:19, 2670:8, 2685:18, 2710:8, 2716:6
research [4] - 2557:13, 2559:10, 2575:5, 2577:9
Research [1] - 2557:14
resent [1] - 2589:20
Reserve [4] - 2559:2, 2559:3, 2559:4, 2559:6
reserve [2] - 2673:21, 2738:25
reserved [3] - 2674:5, 2682:5, 2696:2
residential [1] - 2587:16
resolved [1] - 2697:24
respect [23] - 2559:25, 2563:10, 2563:22, 2605:9, 2609:10, 2640:11, 2645:19, 2653:23, 2658:24, 2669:17, 2699:23, 2700:13, 2704:19, 2707:12, 2709:24, 2710:11, 2717:4, 2717:20, 2718:24, 2723:4, 2724:6, 2726:9, 2738:4
respecting [1] - 2680:7
respects [1] - 2575:14
respond [1] - 2681:22
response [8] - 2623:22, 2623:24, 2653:5, 2654:12, 2676:10, 2678:6, 2709:25, 2718:12
responsibilities [1] - 2671:7
responsibility [5] - 2556:13, 2575:25, 2671:12, 2672:11, 2698:18
rest [8] - 2648:9, 2665:25, 2667:24, 2668:18, 2672:13, 2696:22, 2718:13, 2727:22
restated [1] - 2598:4
restaurant [1] - 2660:18
rested [1] - 2654:9
resting [1] - 2635:22
rests [3] - 2655:4, 2665:9, 2665:12
result [2] - 2588:14, 2733:19
retained [3] - 2561:12, 2561:18, 2563:6
retention [2] - 2561:15, 2664:15
rethink [1] - 2714:14
retry [1] - 2720:7
return [13] - 2565:9, 2580:16, 2580:19, 2580:23, 2584:18, 2625:9, 2637:6, 2640:7, 2647:24, 2649:15, 2719:23, 2729:14, 2730:3
returned [1] - 2566:22
returns [10] - 2563:1, 2565:6, 2581:13, 2582:9, 2583:8, 2603:9, 2609:5, 2611:3, 2615:5, 2625:12
reversed [1] - 2625:1
review [6] - 2560:14, 2571:17, 2579:6, 2593:4, 2601:24, 2608:20
reviewed [12] - 2573:6, 2573:8, 2573:22, 2579:8, 2580:12, 2606:24, 2607:22, 2607:25, 2627:8, 2660:7, 2660:22, 2664:20
revised [1] - 2726:16
revisiting [1] - 2698:17
RICHARD [1] - 2553:2
rides [1] - 2660:12
rings [1] - 2672:7
rise [4] - 2554:3, 2620:4, 2620:12, 2672:15
risk [9] - 2576:12, 2584:19, 2585:25, 2586:1, 2586:7, 2587:25, 2596:16, 2596:18, 2741:9
risks [2] - 2576:7, 2608:14
RMBS [1] - 2614:15
road [3] - 2558:9, 2601:13, 2671:15
Robert [1] - 2556:2
role [2] - 2589:12, 2669:13
roles [1] - 2669:12
room [2] - 2668:24, 2670:22
roughly [3] - 2570:5, 2622:21, 2668:20
routed [2] - 2664:19, 2664:22
Rule [13] - 2639:23, 2641:4, 2642:18, 2642:20, 2642:23, 2643:9, 2643:11, 2643:18, 2645:12, 2645:19, 2677:15, 2679:18, 2681:13
rule [3] - 2641:23, 2645:24, 2655:3
Rule 29 [13] - 2652:12, 2653:1, 2653:5, 2654:9, 2654:12, 2673:16, 2673:19, 2673:25, 2676:15, 2682:5, 2696:2, 2699:22, 2727:22
ruled [4] - 2645:16, 2652:13, 2697:22, 2705:12
rules [4] - 2605:21, 2605:23, 2606:3
ruling [8] - 2641:25, 2642:7, 2647:19, 2647:20, 2658:4, 2659:15, 2664:5, 2680:14
rulings [3] - 2638:9, 2642:14, 2675:13
ruminating [1] - 2704:5
run [5] - 2576:23, 2585:12, 2590:18, 2658:25, 2741:9
running [2] - 2575:12, 2741:3
rush [1] - 2666:20

S

S.A [1] - 2553:8
safe [2] - 2585:13, 2585:14
safeguard [1] - 2720:7
sake [1] - 2701:9
salaries [1] - 2647:5
sale [26] - 2624:1, 2676:3, 2676:6, 2678:1, 2678:25, 2679:10, 2679:18, 2680:9, 2682:20, 2683:10, 2683:20, 2684:1, 2684:18, 2685:3, 2685:18, 2686:13, 2687:14, 2688:7, 2688:8, 2688:10, 2688:16, 2688:23, 2706:22, 2733:24, 2734:13, 2737:21
sales [6] - 2585:21, 2685:9, 2688:19, 2731:16, 2731:19, 2731:25
salespeople [1] - 2627:9
Sand [1] - 2702:8
SANO [1] - 2552:17
Sano [1] - 2554:14
sat [1] - 2571:8
satisfied [3] - 2676:7, 2678:2, 2685:12
satisfy [5] - 2683:18, 2684:13, 2707:5, 2707:11, 2709:1
save [1] - 2697:25
saved [1] - 2683:6
saw [5] - 2590:12, 2607:24, 2623:14, 2624:4, 2633:18
scenario [2] - 2681:21, 2698:5
scheme [4] - 2716:22, 2721:15, 2726:25, 2733:20
Schlisser [1] - 2691:3
school [12] - 2556:9, 2556:11, 2556:14, 2556:16, 2567:19, 2567:20, 2589:5, 2593:20, 2593:24, 2617:15
School [6] - 2557:10, 2557:11, 2557:12, 2571:13, 2605:7, 2605:22

school's [1] - 2556:15
schools [1] - 2600:15
Science [1] - 2557:2
sciences [2] - 2556:12, 2556:22
screwy [1] - 2697:23
seal [1] - 2722:20
searching [1] - 2568:10
seated [5] - 2620:14, 2637:9, 2652:3, 2652:4, 2660:14
SEC [1] - 2681:16
second [26] - 2563:16, 2563:18, 2565:10, 2565:17, 2566:10, 2639:3, 2640:25, 2642:17, 2644:17, 2645:10, 2659:24, 2661:10, 2667:15, 2669:16, 2673:12, 2683:22, 2713:23, 2715:21, 2717:1, 2717:16, 2717:20, 2718:22, 2721:12, 2722:1, 2722:2, 2736:18
Second Circuit [10] - 2654:24, 2654:25, 2655:8, 2655:21, 2657:5, 2657:7, 2677:12, 2697:21, 2697:24, 2705:15
secretary [1] - 2557:16
Section [2] - 2677:15, 2679:8
Sections [1] - 2716:22
secured [3] - 2598:13, 2598:21, 2704:16
secures [1] - 2715:19
securities [67] - 2565:12, 2584:22, 2584:23, 2587:16, 2587:23, 2598:3, 2598:16, 2598:19, 2610:8, 2620:23, 2620:25, 2621:5, 2625:24, 2625:25, 2669:18, 2675:24, 2676:4, 2676:6, 2676:8, 2676:17, 2676:18, 2676:21, 2677:5, 2678:3, 2678:9, 2678:13, 2679:5, 2683:3, 2687:5, 2687:6, 2689:2, 2689:14, 2689:23, 2690:6, 2693:1, 2693:4, 2693:13, 2697:2, 2697:3, 2700:3, 2700:12, 2708:6, 2710:23, 2711:3, 2711:10, 2711:22, 2711:23, 2713:21, 2715:15, 2715:22, 2715:24, 2717:4, 2717:7, 2717:21, 2722:3, 2722:12, 2723:9, 2723:15, 2723:16, 2723:19, 2723:22, 2723:23, 2724:13, 2725:12, 2725:15, 2733:11, 2733:12
Securities [2] - 2681:13, 2681:17
security [20] - 2562:14, 2676:2, 2678:1, 2678:14, 2679:18, 2682:16, 2682:21, 2682:24, 2687:8, 2699:3, 2700:11, 2701:11, 2702:6, 2706:22, 2710:21, 2711:2, 2724:23, 2733:24, 2734:12, 2734:13
see [36] - 2555:16, 2579:9, 2579:12, 2579:14, 2579:16, 2579:17, 2579:19, 2617:8, 2617:10, 2623:22, 2624:6, 2628:12, 2629:20, 2633:8, 2633:11, 2642:25, 2643:14, 2643:24, 2645:2, 2647:10, 2649:14, 2650:15, 2656:10, 2669:1, 2671:18, 2672:13, 2689:18, 2690:2, 2690:12, 2696:21, 2702:19, 2714:23, 2726:11, 2727:13, 2734:10, 2740:8
seeing [1] - 2660:17
seek [1] - 2563:19
seem [5] - 2613:20, 2646:13, 2715:10, 2728:11, 2728:15
sell [22] - 2586:9, 2586:12, 2594:25, 2595:21, 2599:4, 2623:24, 2627:14, 2676:8, 2676:17, 2677:4, 2677:16, 2677:19, 2678:3, 2678:12, 2683:3, 2683:4, 2687:5, 2687:9, 2687:13, 2688:4, 2689:8
sell-side [1] - 2627:14
seller [2] - 2682:16, 2683:12
sellers [1] - 2681:11
selling [4] - 2622:14, 2623:15, 2623:16, 2688:9
sells [1] - 2623:25
send [6] - 2635:10, 2635:18, 2636:16, 2648:8, 2738:13, 2739:4
sending [1] - 2699:11
SENIOR [1] - 2552:11
sense [19] - 2562:10, 2568:7, 2568:17, 2576:1, 2597:8, 2604:19, 2604:21, 2606:20, 2611:21, 2614:12, 2616:22, 2622:5, 2641:7, 2685:25, 2689:19, 2691:14, 2714:1, 2735:21, 2738:24
sensitive [1] - 2690:20
sent [4] - 2579:6, 2664:16, 2668:24, 2735:19
sentence [2] - 2582:13, 2596:9
sentencing [1] - 2724:20
separate [8] - 2684:18, 2684:19, 2700:22, 2711:4, 2711:17, 2716:7, 2723:25, 2725:1
separately [5] - 2656:9, 2711:6, 2711:16, 2712:9, 2712:20
separating [1] - 2696:21
series [3] - 2562:17, 2622:21, 2623:6
seriously [2] - 2686:3, 2740:22
serve [1] - 2703:25
servers [7] - 2652:18, 2652:24, 2653:10, 2664:8, 2664:12, 2664:14, 2664:19
Service [1] - 2559:1
service [2] - 2557:15, 2617:5
services [1] - 2556:20
SESSION [1] - 2652:1
session [1] - 2554:5
set [5] - 2562:14, 2633:21, 2633:25, 2715:20, 2716:7
settings [1] - 2702:13
Seven [2] - 2652:13, 2656:13
seven [5] - 2566:23, 2572:9, 2653:16, 2653:17, 2653:19
several [4] - 2560:17, 2573:14, 2577:1, 2598:18
shape [2] - 2584:9, 2686:9
share [2] - 2614:16, 2666:4
shareholders [2] - 2628:25, 2736:15
sheet [3] - 2670:5, 2696:5, 2696:18
shifted [3] - 2597:13, 2597:14, 2597:15
short [10] - 2585:20, 2619:21, 2623:8, 2625:15, 2625:17, 2626:6, 2647:9, 2662:19, 2677:24, 2691:7
short-cut [1] - 2647:9
shots [1] - 2690:19
show [3] - 2652:8, 2734:1, 2734:2
showing [1] - 2727:9
shown [3] - 2633:3, 2633:10, 2633:12
shows [1] - 2712:4
shut [3] - 2623:12, 2624:9, 2624:19
shutdown [1] - 2581:19
sic] [1] - 2698:10
side [2] - 2578:19, 2627:14
sidebar [4] - 2633:15, 2637:11, 2663:16, 2663:21
Sidebar [2] - 2635:2, 2636:19
Sidley [2] - 2698:10, 2698:11
Siembida [1] - 2654:15
sign [1] - 2589:6
signed [2] - 2664:24, 2690:24
significant [5] - 2576:4, 2594:11, 2621:20, 2732:3, 2739:8
signing [1] - 2629:10
silence [1] - 2706:9
similar [1] - 2727:11
similarly [2] - 2590:6, 2604:22
simple [5] - 2588:22, 2617:17, 2631:14, 2711:18, 2721:2
simplify [1] - 2596:25
simply [10] - 2586:6, 2610:7, 2627:6, 2627:14, 2646:25, 2704:6, 2704:13, 2715:11, 2726:10, 2727:9
simultaneously [1] - 2623:2
SINCLAIR [1] - 2552:16
Sinclair [1] - 2554:14
single [3] - 2588:3, 2621:1, 2621:4
sit [2] - 2573:25, 2620:11
site [1] - 2588:21
sitting [4] - 2565:21, 2566:6, 2571:10, 2650:21
situation [3] - 2654:16, 2675:1, 2684:10
six [8] - 2566:24, 2582:22, 2653:15, 2653:21, 2653:23, 2664:18, 2681:6
size [1] - 2669:11
slightly [1] - 2641:11
slip [2] - 2590:5, 2650:19
small [1] - 2574:15
so-called [5] - 2565:23, 2617:22, 2641:6, 2642:20, 2698:18
sold [3] - 2562:14, 2626:21, 2626:23
Solkema [1] - 2602:10
someone [3] - 2607:12, 2646:16, 2687:16
sometime [1] - 2738:13
sometimes [3] - 2665:21, 2702:12, 2723:6
somewhat [2] - 2567:23, 2723:12
sophisticated [6] - 2588:17, 2692:6, 2692:8, 2692:13, 2694:25, 2695:8
sophistication [5] - 2604:23, 2605:16, 2605:18, 2692:10, 2705:21
sorry [10] - 2570:8, 2577:17, 2607:2, 2640:21, 2642:24, 2662:19, 2662:22, 2690:23, 2703:4, 2722:2
sort [12] - 2572:20, 2575:2, 2581:2, 2602:25, 2614:10, 2661:7, 2685:10, 2697:25, 2701:20, 2704:5, 2714:25
sorts [1] - 2689:9
sound [3] - 2667:15, 2671:25, 2740:6
sounds [8] - 2572:19, 2573:4, 2667:9, 2678:8, 2717:23, 2723:20, 2740:11, 2740:24

source [3] - 2613:3, 2614:23, 2705:18
Southern [1] - 2654:15
speaking [5] - 2612:13, 2706:21, 2706:23, 2718:18, 2728:18
speaks [2] - 2644:10, 2670:1
Special [1] - 2554:15
specific [19] - 2561:18, 2561:19, 2562:21, 2562:23, 2563:8, 2579:21, 2591:1, 2610:11, 2612:5, 2624:12, 2631:2, 2641:24, 2641:25, 2677:9, 2678:9, 2693:14, 2730:25, 2732:18, 2732:21
specifically [10] - 2593:19, 2693:1, 2694:16, 2698:14, 2706:11, 2708:10, 2710:1, 2714:23, 2718:1, 2722:11
specified [1] - 2715:19
speculate [3] - 2607:9, 2627:18, 2632:4
speculating [2] - 2573:16, 2606:9
speech [1] - 2600:21
speeches [1] - 2600:14
spell [1] - 2555:25
spelled [1] - 2628:19
spend [3] - 2574:12, 2675:25, 2731:13
spending [1] - 2559:12
spent [4] - 2568:23, 2569:2, 2569:4, 2574:6
spite [1] - 2688:20
spoken [5] - 2589:22, 2638:1, 2673:6, 2676:22, 2709:1
spreads [3] - 2584:19, 2622:1, 2632:11
Spring [1] - 2629:21
spring [17] - 2582:20, 2583:11, 2590:2, 2590:18, 2600:9, 2600:16, 2600:17, 2600:22, 2608:23, 2609:9, 2610:5, 2610:17, 2610:22, 2616:11, 2618:8, 2621:17, 2630:21
square [1] - 2692:21
squared [1] - 2659:22
stability [1] - 2576:1
stable [1] - 2567:13
staccato [1] - 2637:3
staff [1] - 2569:8
stage [1] - 2735:8
stamped [1] - 2633:14
Stamps [3] - 2678:4, 2681:2, 2681:9
stand [5] - 2555:20, 2591:25, 2620:6, 2620:8, 2680:13
standalone [1] - 2642:22
standard [15] - 2591:23, 2642:6, 2677:3, 2678:23, 2692:14, 2694:9, 2697:19, 2704:6, 2704:17, 2704:19, 2708:18, 2714:25, 2716:17, 2716:18, 2734:14
standards [2] - 2605:17, 2605:25
standing [1] - 2655:20
stands [2] - 2655:13, 2680:12
start [5] - 2668:1, 2670:15, 2672:7, 2728:6, 2738:15
started [1] - 2627:20
starters [1] - 2718:10
starting [2] - 2671:4, 2728:22
starts [1] - 2728:20
state [16] - 2555:25, 2608:22, 2608:24, 2609:8, 2640:23, 2641:13, 2641:15, 2642:2, 2643:5, 2643:7, 2646:14, 2679:19, 2702:24, 2734:11, 2734:19, 2735:10
statement [19] - 2567:2, 2567:4, 2578:3, 2582:23, 2582:24, 2593:18, 2688:15, 2691:3, 2704:21, 2716:3, 2729:2, 2729:17, 2729:18, 2729:19, 2730:14, 2730:22, 2732:7, 2737:19, 2741:12
statements [16] - 2676:16, 2716:14, 2717:8, 2717:14, 2718:15, 2729:3, 2730:9, 2731:16, 2731:20, 2732:1, 2732:4, 2732:6, 2732:15, 2737:20
states [1] - 2727:8
statistical [1] - 2624:16
statistics [1] - 2576:2
statute [14] - 2677:3, 2677:6, 2677:10, 2679:11, 2679:17, 2683:10, 2688:17, 2688:20, 2713:25, 2714:3, 2714:4, 2714:7, 2720:14, 2738:8
statutes [1] - 2690:5
statutory [1] - 2713:18
stay [5] - 2585:11, 2601:9, 2608:17, 2676:16, 2733:8
Stearns [15] - 2645:1, 2646:22, 2646:23, 2647:1, 2647:4, 2652:24, 2653:9, 2664:8, 2664:11, 2664:14, 2664:17, 2664:21
Stearns's [1] - 2664:20
stenography [1] - 2553:14
step [2] - 2634:6, 2649:4
steps [1] - 2587:12
Sterns [1] - 2587:19
stick [2] - 2591:9, 2659:15
still [6] - 2558:8, 2558:9, 2676:11, 2680:8, 2721:21, 2739:15
stints [1] - 2557:15
stipulate [3] - 2652:11, 2652:24, 2657:12
stipulated [3] - 2639:13, 2644:24, 2664:7
stipulation [12] - 2657:14, 2657:15, 2659:20, 2659:23, 2660:4, 2662:15, 2663:13, 2663:14, 2663:23, 2663:25, 2665:5, 2725:16
stop [3] - 2587:9, 2692:2, 2694:24
stopping [1] - 2692:2
Stores [1] - 2681:10
story [1] - 2622:7
strategies [8] - 2561:24, 2579:24, 2580:1, 2604:7, 2604:8, 2606:7, 2606:10, 2609:5
strategy [29] - 2562:5, 2565:2, 2565:3, 2565:10, 2565:14, 2566:6, 2566:21, 2580:9, 2584:16, 2585:2, 2586:23, 2590:14, 2603:13, 2604:17, 2604:18, 2611:2, 2612:6, 2612:7, 2613:11, 2613:14, 2613:22, 2614:2, 2614:3, 2614:12, 2615:18, 2618:8, 2626:8
streamline [1] - 2636:14
Street [7] - 2552:20, 2553:4, 2595:2, 2595:3, 2595:8, 2595:16, 2738:11
stress [6] - 2562:19, 2622:21, 2622:23, 2623:1, 2623:6, 2623:9
stressful [1] - 2589:16
stricken [1] - 2591:8
strictures [1] - 2684:13
strike [1] - 2627:17
striking [1] - 2740:13
stronger [1] - 2583:3
structure [4] - 2559:21, 2631:24, 2668:11, 2677:1
structured [4] - 2562:25, 2563:12, 2564:25, 2565:15
student [1] - 2567:20
students [1] - 2589:6
study [3] - 2559:9, 2559:13, 2559:16
stuff [4] - 2617:20, 2689:7, 2714:24, 2714:25
subject [5] - 2568:21, 2576:16, 2615:21, 2711:16, 2711:17
subjects [3] - 2556:17, 2556:18, 2559:16
submit [6] - 2657:9, 2693:16, 2693:17, 2694:5, 2708:22, 2735:14
subparts [1] - 2723:21
subscriptions [1] - 2685:1
subsection [1] - 2716:5
Subsection [2] - 2716:5, 2716:9
subsequent [2] - 2657:5, 2700:3
subsequently [1] - 2625:1
subset [3] - 2559:15, 2724:10, 2724:24
subsidiary [1] - 2564:8
substantive [2] - 2698:25, 2699:3
substantively [2] - 2670:13, 2701:12
subsumes [2] - 2680:3, 2691:4
success [1] - 2733:20
successful [2] - 2733:18, 2734:16
suffering [1] - 2707:18
suffice [1] - 2681:8
sufficient [9] - 2568:2, 2568:6, 2622:3, 2622:8, 2652:19, 2652:23, 2684:11, 2688:17, 2696:3
sufficiently [1] - 2711:5
suggest [1] - 2581:25
suggested [1] - 2623:11
suggestion [2] - 2711:7, 2712:12
sum [1] - 2648:18
summa [1] - 2557:2
summary [1] - 2691:2
summation [12] - 2648:20, 2649:6, 2666:20, 2667:5, 2667:8, 2667:9, 2667:12, 2667:15, 2667:21, 2740:12, 2740:15, 2741:8
summations [18] - 2636:7, 2648:14, 2648:23, 2649:16, 2649:19, 2665:21, 2666:22, 2667:3, 2667:11, 2668:1, 2671:19, 2671:22, 2709:2, 2735:22, 2738:15, 2740:2, 2740:16, 2741:2
summer [2] - 2736:24, 2737:4
SUNG [1] - 2553:6
superior [2] - 2614:3, 2628:18
supplied [2] - 2573:5, 2608:1
support [5] - 2673:19, 2682:23, 2696:4, 2699:17, 2719:12
supposed [1] - 2561:16
Supreme [4] - 2678:4, 2681:3, 2681:16, 2697:22

survived [1] - 2582:20
SUSAN [1] - 2553:5
susan [1] - 2554:20
susceptibility [1] - 2703:21
suspect [3] - 2667:20, 2668:3, 2693:18
suspend [3] - 2594:1, 2594:13, 2595:19
suspended [1] - 2629:24
suspenders [1] - 2701:21
suspending [2] - 2595:6, 2595:20
suspension [16] - 2593:7, 2593:9, 2593:12, 2593:16, 2593:18, 2593:22, 2594:6, 2594:9, 2594:14, 2594:16, 2594:18, 2594:20, 2594:21, 2595:3, 2596:5
sustained [3] - 2590:25, 2618:15, 2633:17
suture [1] - 2599:8
swaps [2] - 2587:22, 2588:2
Switzerland [2] - 2652:16, 2656:22
sworn [1] - 2555:23
symptom [1] - 2596:11
system [3] - 2559:8, 2575:20, 2664:15

T

table [2] - 2554:15, 2567:16
tables [1] - 2573:12
tale [2] - 2667:16, 2732:13
talks [7] - 2646:10, 2693:9, 2702:8, 2704:7, 2704:13, 2718:5, 2733:16
tandem [2] - 2718:14, 2730:2
tannin [3] - 2579:17, 2595:10, 2598:10
Tannin [25] - 2553:3, 2554:9, 2554:20, 2554:24, 2630:20, 2646:7, 2646:8, 2658:14, 2661:8, 2662:20, 2662:21, 2664:22, 2665:12, 2668:8, 2673:24, 2675:15, 2699:13, 2699:14, 2701:9, 2701:12, 2710:3, 2725:9, 2728:1, 2729:4, 2737:12
TANNIN [1] - 2552:8
target [1] - 2623:7
taught [2] - 2557:9, 2559:17
tax [7] - 2556:23, 2557:16, 2558:1, 2559:12, 2560:20, 2575:14, 2575:16
taxes [1] - 2617:19
teach [3] - 2556:17, 2556:18, 2589:5
teaching [3] - 2556:19, 2557:8, 2557:13
team [2] - 2679:1, 2686:17
team's [1] - 2681:1
technical [1] - 2712:3
telephone [2] - 2725:3, 2736:4
Telephone [1] - 2553:12
ten [5] - 2572:7, 2572:11, 2572:17, 2588:11, 2731:7
tendency [1] - 2670:11
tender [1] - 2560:25
tense [1] - 2637:16
term [5] - 2556:19, 2556:20, 2556:22, 2589:7, 2606:5
terms [17] - 2560:14, 2561:22, 2567:25, 2635:20, 2666:13, 2669:4, 2671:13, 2672:10, 2682:21, 2691:5, 2691:9, 2696:3, 2698:17, 2699:9, 2700:11, 2709:18, 2735:20
terribly [1] - 2606:22
terrorism [1] - 2576:7
terrorist [2] - 2558:1, 2576:12
test [4] - 2605:9, 2623:1, 2623:9
testified [13] - 2555:24, 2560:21, 2572:13, 2601:25, 2620:19, 2624:7, 2625:3, 2629:19, 2646:24, 2647:4, 2693:6, 2698:10, 2703:9
testify [9] - 2641:14, 2642:3, 2646:25, 2653:9, 2656:1, 2664:9, 2664:10, 2664:13
testifying [1] - 2641:3
testimony [25] - 2574:1, 2574:25, 2591:3, 2602:16, 2602:20, 2602:21, 2602:22, 2618:17, 2619:1, 2619:2, 2619:7, 2619:10, 2629:22, 2637:23, 2656:6, 2656:17, 2656:20, 2657:8, 2657:12, 2665:19, 2670:19, 2670:21, 2695:9, 2715:4, 2721:23
tests [7] - 2562:19, 2605:9, 2622:4, 2622:22, 2622:23, 2623:6, 2623:7
text [1] - 2628:20
textbook [2] - 2560:17, 2560:18
themselves [3] - 2559:20, 2612:25, 2614:6
theoretically [1] - 2725:20
theory [5] - 2699:1, 2700:17, 2700:19, 2711:12, 2731:2
therefore [3] - 2681:14, 2688:22, 2711:21
thesis [4] - 2589:25, 2600:9, 2600:11, 2600:14
thinking [5] - 2630:20, 2649:13, 2719:9, 2720:5, 2721:22
thinks [1] - 2586:20
third [4] - 2596:11, 2599:24, 2646:20, 2659:5
third-parties [1] - 2659:5
third-party [1] - 2646:20
thoughts [5] - 2646:12, 2672:5, 2675:7, 2690:2, 2698:6
three [17] - 2557:21, 2565:1, 2570:18, 2577:22, 2578:6, 2638:13, 2649:9, 2649:10, 2653:9, 2667:22, 2669:6, 2690:12, 2695:17, 2695:21, 2696:6, 2696:21, 2711:4
throughout [4] - 2580:25, 2621:12, 2696:25, 2697:10
throws [1] - 2564:2
thrust [1] - 2689:7
Thursday [12] - 2636:12, 2648:15, 2649:16, 2666:15, 2668:1, 2672:13, 2738:16, 2739:11, 2739:25, 2740:8, 2741:6
timed [1] - 2649:8
timeframe [1] - 2627:8
timing [2] - 2665:25, 2738:4
titled [1] - 2714:21
toast [1] - 2579:18
today [10] - 2555:17, 2574:11, 2592:14, 2600:10, 2648:8, 2678:5, 2727:23, 2731:10, 2731:11, 2735:15
together [7] - 2570:19, 2582:17, 2628:22, 2641:12, 2650:8, 2700:17, 2727:10
tolerance [3] - 2596:18, 2607:8, 2607:15
tolerate [1] - 2606:15
tomorrow [14] - 2636:7, 2648:14, 2666:2, 2666:11, 2671:24, 2672:13, 2731:6, 2738:13, 2738:17, 2738:20, 2738:22, 2739:5, 2739:10, 2739:25
tonight [5] - 2690:24, 2696:17, 2734:10, 2738:10, 2739:13
took [6] - 2582:22, 2598:2, 2598:18, 2598:20, 2598:24, 2688:19
top [4] - 2573:12, 2573:13, 2597:13, 2721:11
topic [1] - 2557:25
topics [7] - 2557:23, 2559:20, 2575:6, 2576:23, 2577:1, 2578:5, 2734:24
tops [1] - 2667:20
toss [1] - 2656:5
touch [3] - 2591:11, 2678:25, 2734:13
touched [1] - 2609:14
touches [1] - 2660:21
touching [1] - 2678:21
toward [1] - 2621:16
toxic [1] - 2599:6
Trade [1] - 2559:1
trade [4] - 2626:5, 2707:24, 2708:1
traded [2] - 2703:3, 2703:8
trades [5] - 2595:13, 2626:10, 2626:13, 2626:17, 2631:24
trading [12] - 2614:2, 2669:19, 2698:17, 2703:12, 2707:12, 2707:14, 2707:15, 2707:16, 2707:25, 2708:9, 2727:23, 2736:12
Trading [3] - 2626:2, 2626:3, 2626:7
traditional [1] - 2624:15
traditionally [2] - 2588:7, 2631:22
tranche [2] - 2614:15, 2625:18
tranches [3] - 2585:12, 2587:16, 2612:19
transaction [4] - 2588:11, 2598:13, 2609:23, 2717:7
transactions [4] - 2562:13, 2617:22, 2623:15, 2624:4
transacts [1] - 2702:16
TRANSCRIPT [1] - 2552:10
Transcript [1] - 2553:14
Transcription [1] - 2553:14
transcripts [3] - 2601:25, 2602:3, 2602:7
transfer [1] - 2712:16
travel [1] - 2574:17
Treasuries [1] - 2575:17
Treasury [1] - 2557:17
treasury [2] - 2575:16, 2575:18
treated [1] - 2714:10
treatment [1] - 2575:14
Tremont [1] - 2608:4
trend [1] - 2625:2
trial [16] - 2554:8, 2554:23, 2561:7, 2567:10, 2574:22, 2574:25, 2590:14, 2590:21, 2602:1, 2646:18, 2666:7, 2671:23, 2696:25, 2714:17, 2714:22
TRIAL [1] - 2552:10

trials [1] - 2574:21
tricky [1] - 2697:7
tried [1] - 2589:22
triggered [1] - 2718:16
triple [3] - 2620:25, 2621:3, 2625:18
trouble [1] - 2595:20
troubled [1] - 2654:8
true [12] - 2604:1, 2611:12, 2611:13, 2615:3, 2631:9, 2646:19, 2655:5, 2677:22, 2731:23, 2733:21, 2734:18, 2737:9
truism [1] - 2702:13
trust [2] - 2702:11, 2704:16
trusted [1] - 2638:10
truth [2] - 2706:18, 2730:7
try [14] - 2595:21, 2602:4, 2617:16, 2627:25, 2644:2, 2666:23, 2671:8, 2690:14, 2690:20, 2700:25, 2717:22, 2725:5, 2727:15, 2738:12
trying [21] - 2567:22, 2571:12, 2586:2, 2589:9, 2594:19, 2596:20, 2596:25, 2645:4, 2645:20, 2646:25, 2647:6, 2647:8, 2655:11, 2656:24, 2678:4, 2686:6, 2687:21, 2690:10, 2690:11, 2691:5, 2712:3
Tuesday [1] - 2552:7
tune [2] - 2636:9, 2648:10
turmoil [1] - 2576:5
turn [5] - 2666:8, 2670:16, 2679:1, 2681:16, 2701:24
turns [1] - 2666:1
Twelfth [1] - 2552:20
twenty [1] - 2599:1
twice [1] - 2575:8
two [53] - 2557:15, 2562:3, 2566:16, 2567:12, 2568:10, 2575:14, 2584:13, 2584:15, 2587:19, 2592:4, 2592:6, 2592:7, 2592:8, 2599:11, 2608:10, 2620:24, 2621:24, 2625:11, 2628:21, 2639:9, 2642:8, 2644:16, 2646:11, 2653:9, 2662:4, 2662:17, 2667:3, 2673:10, 2678:7, 2684:2, 2690:12, 2693:15, 2704:3, 2706:5, 2710:1, 2710:3, 2710:10, 2710:12, 2710:16, 2710:24, 2711:4, 2711:19, 2712:5, 2712:9, 2715:3, 2731:14, 2733:3, 2733:4, 2734:3, 2735:24, 2736:6
two-fold [1] - 2678:7
type [8] - 2562:13, 2608:9, 2642:13, 2650:18, 2654:15, 2712:12, 2712:22, 2725:4
types [5] - 2562:11, 2609:18, 2615:17, 2646:14, 2678:23
typical [1] - 2613:14
typically [4] - 2613:12, 2615:21, 2621:14, 2623:24

U

U.S [6] - 2558:3, 2558:18, 2558:21, 2681:5, 2681:18
UC [1] - 2675:1
ultimate [1] - 2592:6
ultimately [5] - 2583:14, 2596:7, 2600:19, 2601:16, 2656:19
unanimity [1] - 2726:6
unanimous [3] - 2670:3, 2695:20, 2726:2
unanimously [1] - 2710:18
unaware [1] - 2640:12
under [26] - 2569:9, 2575:25, 2598:15, 2639:23, 2641:4, 2641:5, 2642:18, 2642:20, 2643:10, 2645:12, 2652:19, 2666:20, 2666:25, 2677:3, 2677:14, 2681:13, 2684:13, 2688:17, 2688:18, 2688:19, 2688:23, 2689:14, 2693:13, 2707:14, 2711:11, 2714:10
Under [1] - 2697:11
undercuts [2] - 2733:22, 2733:24
undergone [1] - 2622:23
underlie [1] - 2568:15
underlying [4] - 2562:15, 2596:24, 2597:11, 2610:25
understood [3] - 2606:7, 2614:7, 2674:2
undoubtedly [1] - 2668:7
undue [1] - 2724:11
unfinished [1] - 2644:15
unfold [2] - 2668:9, 2671:18
unfortunately [3] - 2595:16, 2646:4, 2729:13
unique [3] - 2567:23, 2602:25, 2612:10
United States [14] - 2552:1, 2552:3, 2552:5, 2552:11, 2552:14, 2552:18, 2554:3, 2554:8, 2554:12, 2554:13, 2554:23, 2569:19, 2654:23, 2681:4
University [7] - 2556:10, 2557:2, 2557:5, 2557:7, 2557:8, 2557:11, 2600:21
university [1] - 2556:16
unlawful [1] - 2733:18
unless [3] - 2568:9, 2638:5, 2727:24
unnecessary [1] - 2648:12
unpack [3] - 2595:23, 2595:24, 2596:19
unreasonable [1] - 2603:6
unsuccessful [1] - 2734:17
untrue [5] - 2717:8, 2717:13, 2729:19, 2730:14, 2730:22
up [50] - 2555:3, 2573:2, 2584:13, 2584:20, 2586:18, 2588:16, 2589:6, 2598:14, 2599:6, 2600:2, 2602:22, 2604:4, 2604:5, 2605:13, 2608:4, 2614:4, 2614:23, 2615:1, 2615:10, 2619:8, 2624:13, 2626:14, 2626:17, 2631:15, 2632:12, 2633:5, 2639:2, 2640:24, 2644:19, 2645:11, 2645:14, 2645:18, 2646:4, 2647:23, 2648:18, 2650:19, 2656:18, 2661:14, 2666:23, 2669:11, 2670:4, 2674:9, 2690:24, 2700:4, 2708:2, 2726:11, 2729:6, 2733:8, 2739:9
upside [1] - 2586:5
useful [1] - 2566:8
uses [2] - 2565:5, 2741:5

V

valid [1] - 2711:7
Value [3] - 2626:1, 2626:3, 2626:7
value [11] - 2562:17, 2581:18, 2614:2, 2626:5, 2626:10, 2626:13, 2626:15, 2631:23, 2632:10, 2632:15, 2696:20
Van [1] - 2602:10
variables [1] - 2558:15
varied [1] - 2604:22
variety [3] - 2556:18, 2583:17, 2702:13
various [5] - 2660:23, 2669:22, 2673:3, 2678:16, 2684:3
vary [1] - 2670:13
vast [2] - 2576:22, 2616:4
vehicle [5] - 2621:13, 2621:14, 2621:16, 2621:17, 2621:18
vehicles [5] - 2560:5, 2577:11, 2587:20, 2612:13
venue [6] - 2696:24, 2697:1, 2697:7, 2697:11, 2697:18
verdict [7] - 2670:3, 2670:5, 2696:5, 2696:17, 2719:12, 2719:19, 2719:23
versus [5] - 2554:24, 2654:23, 2681:4, 2681:9, 2681:16
viability [1] - 2616:12
viable [2] - 2617:8, 2618:8
vial [1] - 2712:5
Vice [1] - 2664:10
victim [1] - 2675:16
victims [1] - 2692:13
view [19] - 2567:14, 2581:9, 2581:19, 2582:17, 2595:3, 2614:15, 2614:16, 2614:17, 2621:19, 2632:5, 2633:3, 2665:25, 2697:10, 2699:8, 2699:17, 2702:25, 2704:25, 2724:20, 2733:22
viewed [1] - 2609:8
views [2] - 2581:2, 2597:11
vintage [2] - 2587:25, 2614:15
vintages [2] - 2625:18, 2625:19
violation [1] - 2679:6
virtue [1] - 2652:18
voice [1] - 2602:5
volatility [1] - 2626:19
vote [1] - 2666:1
vulnerability [1] - 2703:22

W

wait [4] - 2643:24, 2647:22, 2683:22, 2715:21
Wall [5] - 2595:2, 2595:3, 2595:8, 2595:16, 2738:11
wants [7] - 2557:24, 2627:14, 2674:25, 2698:2, 2698:21, 2702:10, 2718:9
warrant [2] - 2670:17, 2728:9
wash [1] - 2724:21
Washington [1] - 2552:21
waste [1] - 2555:14
watch [1] - 2620:1
waterfront [1] - 2644:11
ways [4] - 2565:24, 2625:11, 2625:12, 2631:25
wealth [4] - 2692:20, 2692:21, 2694:15, 2695:2
wealthier [1] - 2606:21
wearing [1] - 2701:20
web [1] - 2588:20

Wednesday [1] - 2650:22
week [3] - 2649:14, 2667:25, 2671:11
weekend [2] - 2668:18, 2671:20
weekly [1] - 2622:21
Western [1] - 2557:8
WHEREUPON [1] - 2741:14
Whippany [4] - 2652:22, 2664:15, 2664:19, 2664:23
WHIPPANY [1] - 2664:16
White [1] - 2557:18
white [2] - 2575:19, 2606:3
whole [5] - 2590:17, 2618:6, 2633:21, 2649:13, 2697:23
wide [1] - 2576:22
widely [1] - 2614:6
widen [1] - 2632:11
widened [1] - 2622:1
WIEGMANN [35] - 2552:22, 2676:12, 2679:7, 2679:13, 2679:15, 2680:7, 2680:14, 2680:22, 2686:16, 2686:19, 2686:23, 2687:3, 2687:7, 2687:10, 2687:14, 2688:2, 2688:8, 2688:13, 2690:4, 2690:8, 2702:22, 2703:6, 2704:25, 2705:2, 2705:4, 2705:6, 2705:17, 2706:7, 2708:4, 2718:21, 2718:24, 2719:8, 2720:3, 2721:5, 2721:10
Wiegmann [1] - 2679:15
willful [1] - 2732:18
willfully [1] - 2717:2
WILLIAMS [1] - 2552:19
willing [5] - 2598:25, 2649:2, 2652:11, 2652:23, 2711:13
win [2] - 2605:10, 2659:17
wire [19] - 2652:8, 2657:6, 2669:20, 2698:21, 2699:7, 2699:9, 2723:6, 2723:17, 2723:21, 2723:24, 2724:6, 2724:7, 2724:10, 2724:24, 2725:2, 2725:15, 2725:19, 2725:25
wires [1] - 2725:8
wise [1] - 2626:16
wish [8] - 2561:2, 2564:6, 2569:11, 2632:3, 2638:24, 2648:21, 2652:7, 2662:10
wished [1] - 2603:11
wishes [1] - 2637:21
withdraw [1] - 2599:3
withdrawn [2] - 2579:13, 2677:21
Witness [2] - 2620:6, 2620:8
witness [12] - 2555:7, 2555:13, 2555:18, 2556:4, 2564:7, 2619:5, 2620:6, 2620:8, 2634:11, 2653:8, 2656:21, 2695:10
WITNESS [47] - 2556:2, 2561:14, 2561:17, 2561:21, 2561:24, 2562:3, 2562:6, 2562:9, 2562:11, 2562:23, 2563:5, 2563:7, 2563:11, 2563:18, 2563:23, 2564:2, 2564:21, 2577:19, 2584:4, 2584:13, 2585:8, 2586:20, 2587:12, 2588:18, 2589:7, 2593:25, 2596:11, 2596:23, 2597:7, 2597:10, 2611:17, 2612:4, 2612:8, 2612:12, 2612:18, 2612:24, 2613:7, 2613:10, 2614:14, 2615:15, 2616:18, 2616:21, 2616:25, 2617:17, 2619:10, 2634:8, 2742:3
witnesses [5] - 2635:15, 2637:20, 2641:22, 2659:8, 2669:12
won [2] - 2605:11, 2695:12
wonderful [1] - 2683:5
Wonderful [1] - 2587:12
word [5] - 2624:15, 2667:9, 2719:19, 2739:10, 2740:21
words [4] - 2583:25, 2613:4, 2691:14, 2722:21
works [3] - 2558:14, 2666:13, 2671:19
world [5] - 2567:23, 2579:3, 2589:10, 2600:8, 2694:1
worried [4] - 2697:13, 2720:10, 2720:11, 2720:12
worries [1] - 2720:9
worry [3] - 2706:1, 2727:3, 2727:21
worst [2] - 2622:25, 2623:2
worth [7] - 2593:16, 2605:1, 2605:9, 2607:10, 2693:21, 2725:11, 2725:17
wrap [1] - 2666:23
write [4] - 2571:18, 2689:25, 2735:12, 2739:24
writing [2] - 2571:10, 2735:16
writings [2] - 2581:1, 2735:11
written [13] - 2559:16, 2559:24, 2560:4, 2560:16, 2560:19, 2576:6, 2605:9, 2670:7, 2670:9, 2670:10, 2670:14, 2735:7
wrongfully [2] - 2687:16, 2687:17
wrote [4] - 2571:2, 2571:8, 2592:13, 2725:9

Y

year [1] - 2664:18
years [8] - 2557:14, 2558:25, 2560:7, 2560:13, 2630:5, 2630:8, 2683:6, 2697:10
yellow [4] - 2622:11, 2623:14, 2623:20, 2629:20
yesterday [3] - 2706:4, 2723:10, 2738:8
YORK [1] - 2552:1
York [8] - 2552:5, 2552:14, 2552:15, 2553:4, 2554:4, 2569:20, 2664:17
York-based [1] - 2664:17
yourself [2] - 2672:6, 2727:25

Z

zero [2] - 2632:13, 2632:15